85-909 (1)

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARION NAMENWIRTH

Petitioner

vs.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Lee Cullen

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Madison, WI 53703
(608)251-0101

October, 1985

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The petitioner, Marion Namenwirth, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 6, 1985, affirming the denial of relief under 42 U.S.C. §2000(e), et seq., and that on hearing the judgment denying relief be reversed.

I. QUESTIONS PRESENTED

1. In a Title VII sex discrimination action, can the federal district and

appeals courts defer to the subjective judgment of a university faculty committee when deciding whether there was discrimination present in the assessment of qualifications of a candidate for tenure?

2. In a Title VII sex discrimination action, which alleges sex discrimination in the denial of tenure to a female college professor, has the plaintiff had a full and fair opportunity to demonstrate that the proffered reason for the denial is a pretext when the trial court fails to make any finding of fact about the comparative qualifications of the tenure candidates?

3. At the third stage of a Title VII sex discrimination action, is the standard of proof properly whether the employer's reason for the employment decision is "reasonable and not

arbitrary", or is it whether the employee has met her burden of showing that the proffered reason is pretext?

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IV. OPINIONS BELOW

The opinion of the Court of Appeals is reported at 769 F.2d 1235, and appears in Appendix A, attached hereto. The opinion of the District Court for the Western District of Wisconsin is not reported and appears in Appendix B, attached hereto.

V. JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 6, 1985. This petition for certiorari was filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

42 U.S.C. §2000e-2(a)(1):

> **(a) Employers.** It shall be an unlawful employment practice for an employer:
>
> **(1)** To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex or national origin.

VII. STATEMENT OF THE CASE

The petitioner, Marion Namenwirth, was denied tenure at the University of Wisconsin-Madison during the 1976-77 academic year by the Biological Divisional Committee, after she received a favorable recommendation from the Department of Zoology. She was the first woman in thirty-five (35) years to be considered for tenure in the Zoology Department, and the first person ever to be denied tenure in the department. After an appeal and reconsideration of the original decision, tenure was again denied by the Divisional Committee in October, 1978 and by the Dean of the College of Letters and Sciences in January, 1979. In May, 1979 a male colleague in the Zoology Department was granted tenure in the all-male department.

In July, 1979, the petitioner filed a complaint with the United States Department of Labor, which found that the petitioner has been denied tenure because of her sex.

The Labor Department concluded that a weak tenure recommendation from the Department of Zoology was the product of sex discrimination.

Marion Namenwirth brought an action in the District Court for the Western District of Wisconsin in October, 1983. She alleged that the tenure denial was the result of disparate treatment, and that she had suffered a deprivation of her rights under Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. §2000(e), et seq. The case was tried before a magistrate with the consent of the parties pursuant to 28 U.S.C. §636(c)(1). After trial, at which evidence was presented to prove discrimination by department members and their disparate treatment of the tenure candidates, both parties prepared numerous proposed findings of fact. The magistrate rejected most of the petitioner's proposed findings of fact

as "not genuinely material or relevant" (Appendix B, p. 2). The magistrate did not make a finding of fact on the comparative tenure qualifications of Marion Namenwirth and other male candidates who had been granted tenure from the same department.

The magistrate found that Ms. Namenwirth had discharged her burden of establishing a prima facie case of discrimination by showing that: 1) she is a member of a protected class; 2) she was qualified for tenure; 3) she was denied tenure; and 4) an applicant not in the protected class was granted tenure. McDonnell-Douglas v. Green, 41 U.S. 792, 807 (1973). The magistrate also found that the University had come forward at the second stage and rebutted the prima facie case by producing a legitimate, non-discriminatory reason for its action. This reason was that Ms. Namenwirth's research and research

potential were allegedly insufficient to meet the standard required for tenure.

The proceeding thus entered the third stage, where the petitioner had the burden of proving the proffered reason to be a pretext. However, rather than consider the petitioner's evidence on the comparative qualifications of tenure candidates both before and after her consideration, the magistrate set out to examine only "the defendant's evidence with the strictest scrutiny." The magistrate concluded that the denial of tenure was "a reasonable decision ... which I cannot reject as arbitrary" (Appendix B, pp. 25-26).

The petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The case was argued on November 14, 1984 and was decided on August 6, 1985. On appeal, the petitioner argued that the magistrate should have considered comparative evidence of the qualifications

of tenure candidates; that it was the magistrate's duty to determine if the proffered reason was pretextual, and not to just examine the reasonableness of the decision; and that, on the facts, the magistrate's conclusion was clearly erroneous. The panel of the Court of Appeals decided for the respondent by a 2 to 1 vote.

The Appeals Court agreed with the petitioner that comparative evidence has an essential role in determining whether an employer's proffered reason is pretextual. However, the majority opinion stated that, because the magistrate had decided the employer's decision was "not arbitrary", he had considered the comparative evidence. "A motive that is applied in some cases and not in others ... is arbitrary, and we cannot imagine what the magistrate would have meant by the use of the word if he did not mean that the University's standards of excellence were applied to all equally"

(Appendix A, p. 11). Based on the magistrate's use of "not arbitrary", the Seventh Circuit majority concluded that the magistrate did consider the comparative evidence, despite his failure to include any evidence of this comparison in his findings of fact.

The opinion of the Court also agreed with petitioner that using a standard of "reasonable and not arbitrary" would be error, since it would not suffice to show that a proffered reason is not a pretext. This is because a reason can be "true and genuine" and still be used in a discriminatory way, as when a woman is denied tenure based on her credentials, while men with the same credentials are promoted (Appendix A, pp. 10, 11). Nonetheless, the majority relied on its conclusion that the magistrate had considered the comparative evidence, and therefore held that he had used the correct legal standard after all.

The majority rejected the petitioner's argument that the magistrate's finding was clearly erroneous. The opinion says that the close vote of the department was "substantial evidence" that could not be offset by the evidence of past discrimination (Appendix A, p. 15). The court recognized that the vote itself could be an indication of bias, but it explicitly rejected any duty to investigate a department's decision-making process. "Given the similar research output of two candidates, an experienced faculty committee might - quite rightly - come to different conclusions. It is not our place to question the significance or validity of such conclusions" (Appendix A, p. 14; emphasis added). The majority goes so far as to say "that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose." (Id., emphasis added.)

A dissenting opinion criticizes the majority's absention from inquiring into employment decisions in university settings. After comparing the qualifications of petitioner with her male colleagues, the dissenting judge concludes he would reverse on the basis of a clearly erroneous finding by the magistrate.

The petitioner seeks review of the affirmance of the judgment of the District Court, and outright reversal of the judgment for the respondent. In the alternative, the petitioner seeks remand to the District Court for a consideration of the comparative evidence.

VIII. REASONS FOR GRANTING THE WRIT

(1) A court should not defer to the subjective judgment of an employer when it is determining if an employment decision is discriminatory. Allowing the decision of the Court of Appeals to stand means that in the Seventh Circuit a court will abstain from evaluating an employment decision whenever a subjective judgment is required of the employer, as it is, for example, in a tenure decision. The Seventh Circuit's opinion is in clear conflict with the 1972 amendment to the Civil Rights Act, 42 U.S.C. §2000(e), et. seq., which extended civil rights protection to higher education. The Seventh Circuit's decision is also in conflict with the procedure to be followed in Title VII cases, as established by the Supreme Court and followed in other circuits.

The 1972 amendment to Title VII repealed the exemption granted to higher

education in the original Civil Rights Law of 1964. (The Equal Employment Opportunity Act of 1972, Pub. L. No. 92, 26C, §3; codified at 42 U.S.C. §2000(e)-1.) That Congress specifically intended to grant the protection of the anti-discrimination laws to university professors, and other upper-level employees, is shown by the legislative history.

> The committee believes that it is essential that these employees [in the higher paying and more prestigious positions] be given the same opportunities to redress their grievances as are available to other employees in the other sectors of business. (Sen. Rep. No. 415, Rud. Cong., 1st Sess. 12 (1971)1 cf. H. Rep. No. 238, 92nd Cong., 2d Sess., reprinted at 1972 U.S. Code Cong. & Ad. News, 2137, 2155).

The Court of Appeals for the Seventh Circuit has announced by the decision in this case that it will no longer allow

university professors to succeed in any discrimination action where the employer's subjective judgment is involved in an employment decision. Againt the clear mandate of Congress, the court says that "[i]t is not our place to question the significance or validity" of the conclusions of a faculty committee (Appendix A, p. 14). "Because of the way we have described the problem - the decision-maker is also the source of the qualifications - there may be no solution ... [T]he plaintiff is bound to lose." (Id.) This singular announcement of failure is, because of the way the Court defines the problem, really a refusal to apply the law as Congress intended. But there is no reason why the Court should describe the problem as it does. As the dissenting judge says "I do not see a qualitive distinction between a tenure decision, and any other employment decision." The subjective esteem of

colleagues and supervisors is often the key to any employment decision." (Appendix B, p. 17). The dissenting opinion is the one in accordance with the Supreme Court interpretation of Title VII.

The law often obliges finders of fact to inquire into a person's state of mind. U.S. Postal Service v. Aikens, 460 U.S. at 716. In Aikens, the Court said:

> All courts have recognized that the question facing triers of facts in discrimination cases is both sensitive and difficult. ... But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. (Id.)

In the petitioner's case, both the trial court and the Court of Appeals have treated discrimination differently from other questions of fact. The dissenting opinion shows how the question should be faced - the judge looked at the comparative

evidence and at the evaluations of outside experts to check the validity of the tenure committee's decision. The dissent finds it "difficult to believe that any fact other then sex explains the double-standard applied by the University" and concludes that the employer's proffered reasons is pretextual (Appendix A, p. 29). It is because the dissent follows the "McDonnell-Burdine-Aikens" procedure that the judge is able to carry out the required evaluation of the subjective judgment of the tenure committee. The opinion of the majority in the Appeals Court is nothing more than a sub rosa retreat to an explicit policy of judicial abstention in tenure cases. This policy of abstention has been rejected in most of the circuits. See Powell v. Syracuse University, 580 F.2d 1150,1153 (2nd Cir.),

cert. denied, 439 U.S. 984 (1978).[1] It is because the majority in the Seventh Circuit deviates from the Aikens procedure that it finds itself unable to make that evaluation.

Employment decisions that may discriminate and are based on subjective judgments have been reviewed with great suspicion by courts. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the court rejected an employer's evaluations when they were "extremely vague and fatally open to divergent interpretations ..." (422 U.S. at 433). Numerous lower courts have struggled with the question of how to make

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1. Kunda v. Muhlenberg College, 621 F.2d 532, 551 (3rd Cir., 1980); Smith v. University of North Carolina, 632 F.2d 316, 345 fn. 26 (4th Cir., 1980); Lynn v. Regents of the University of California, 656 F.2d 1337,1342 (9th Cir., 1980), cert. denied, 459 U.S. 823 (1982); Whiting v. Jackson State University, 616 F.2d 116, 120-121 (5th Cir., 1980); Sweeney v. Board of Trustees, 604 F.2d 106, 108 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980); Carlile v. South Routt School District, 739 F.2d 1496, 1499 (10th Cir. 1984)

such a review.[2] It was out of this struggle that the "McDonnell-Burdine-Aikens" procedure was developed to determine when an employer's proffered reason is pretextual. Even in the rarified atmosphere of the University, a proper determination can be made if the finding is based on comparative evidence, if the correct legal standard is used, and if, as the dissent in the petitioner's case says, the court uses common sense and the help of outside experts to act as its guide.

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2. Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir., 1972); Watkins v. Scott Paper Co., 530 F.2d 1159, 1188-90 (5th Cir.), cert. denied, 429 U.S. 861 (1976); Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir., 1980), cert. denied, 101 S.Ct. 3083 (1981); Chanee v. Board of Examiners, 458 F.2d 1167 (2d Cir., 1972); Senter v. General Motors Corp., 532 F.2d 511, 528, 30 (6th Cir.), cert. denied, 429 U.S. 870 (1976); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir.), cert. denied, 409 U.S. 982 (1972); Powell v. Syracuse University, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978); Sweeney v. Board of Trustees, 569 F.2d 169, 176 (1st Cir.), vacated and remanded per curicum, 439 U.S.

(2) At the third stage of a Title VII discrimination suit the legal standard is whether the plaintiff has met her burden of proving that the employer's explanation is "not the true reason for the employment decision." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Once the defendant produces a reason for the employment decision, "the fact-finder must then decide whether the rejection was discriminatory within the meaning of Title VII." U.S. Postal Service v. Aikens, 460 U.S. 711, 715 (1983). In the present case, the magistrate also failed to balance the petitioner's arguments against the respondent's proffered reason. Instead, the magistrate concentrated on only the respondent's explanation. This explanation, the magistrate concluded, was reasonable and not arbitrary. However, this

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(cont.)
24 (1978).

is a procedure and a legal standard better suited to the review of an administrative agency's action, than it is to fairly decide a court trial on a civil rights violation. The magistrate failed to follow the "McDonnell-Burdine" procedure to determine if the employer's reason was in fact a pretext.

The Court of Appeals recognized that it would have been a legal error for the magistrate to use a standard of reasonable and not arbitrary. But the Court decided that he did apply the correct standard based on its conclusion that the magistrate did consider the comparative evidence. The opinion reads:

> The magistrate compared [Namenwirth's] record with the record of men who were awarded tenure and determined that the claim that the Department - and the University - found insufficient promise in Namenwirth's work was not pretextual." (Appendix A, p. 13).

This is simply wrong. The magistrate made no finding of fact on the comparative records of Namenwirth and her male colleagues. Instead, he rejected such evidence as not material or relevant. The magistrate also did not use comparative evidence to ground his determination that the employer's reason was not pretextual. Instead, his stated grounds are that he found the decision reasonable and not arbitrary. The Court of Appeals' justification for the magistrate's legal procedure is completely untenable. The petitioner asks that the Supreme Court correct the errors of the Court of Appeals on the procedure and legal standard to be used in a Title VII case.

(3) The plaintiff in a Title VII discrimination case must be allowed a fair opportunity to present comparative evidence of treatment between the plaintiff and other employees. This is because the plaintiff must have a full and fair opportunity to

demonstrate that the proffered reason for an employment decision is in fact a pretext. McDonell-Douglas v. Green, 411 U.S. 792, 804 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). The ultimate burden of showing discrimination means showing that the employer is treating an employee less favorably than others because of her sex. Furnco Construction Corp. v. Waters, 435 U.S. 567, 577 (1978); citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 355, fn. 15 (1977). Comparative evidence of an employer's treatment of the plaintiff and other employees is relevant, and may be necessary, to prove discrimination. U.S. Postal Service v. Aikens, 460 U.S. at 714, fn. 2. Therefore, a plaintiff who is not allowed to present comparative evidence of employer

treatment of classes of employees has been denied a fair opportunity to demonstrate that an employer's proffered reason is a pretext.

A plaintiff in a Title VII action may succeed by either persuading the court that: 1) a disciminatory reason motivated the employer; or by 2) showing that the employer's proffered explanation is unworthy of credence. Burdine, 450 U.S. at 456. As in any lawsuit, the plaintiff may prove her case by direct or circumstantial evidence. Aikens, 460 U.S. at 714 n. 3. Comparative evidence bears on the ultimate facts at issue insofar as it shows the Court that a discriminatory motive more likely motivated the employer, or insofar as it shows that the proffered explanation is unworthy of credence. A court presiding over a non-jury trial has an obligation to make findings on all ultimate facts so as to preserve the record on review. Fed. R.

Civ. P. 52(a). Where a court omits from its decision numerous proposed findings of fact on comparative evidence, and these proposed findings do relate to the ultimate facts at issue, then the court is denying a fair opportunity to the plaintiff to demonstrate that the employer's proffered reason is in fact a pretext.

The magistrate rejected over one hundred and fifty proposed findings of fact under the petitioner's most likely motivated approach to proving discrimination. He did make a finding that women have been underrepresented at the University of Wisconsin (Appendix B, Findings 39-48, pp. 12-14; as of 1978, 6 of 323 tenured professors in science departments were women). However, the court rejected a vast amount of credible evidence on the treatment of Ms. Namenwirth and her male colleagues in the tenure process, and on the behavior and discriminatory history of the

respondent. This evidence was comparative in that much of it focused on the disparate treatment accorded Ms. Namenwirth: it did not address the substance of the employer's reason for the tenure denial. The magistrate rejected this comparative evidence as not "genuinely relevant or material", because he was examining only the respondent's proffered reason (Appendix B, p. 2). By rejecting comparative evidence of disparate treatment when examining the respondent's reason, the court denied the petitioner a full and fair opportunity to present evidence that the employer's reason was pretextual.

The petitioner also proposed numerous findings of fact to show that the employer's explanation was unworthy of credence. The magistrate rejected thirty-six proposed findings that compared the research and research potential of Namenwirth with her male colleagues. The court failed to make

any comparison between the tenure candidates on their research qualifications to see if in fact the employer's proffered reason for its employment decision was worthy of credence. The court's basis for refusing to make a finding on these qualifications was that there is a subjective element in the decision-making process (cf. Appendix B, Finding 20, p. 7). The petitioner believes that where she was the only woman in thirty-five years to be considered for tenure and the only person ever to be rejected, then comparative evidence would show that the respondent's proffered reason is unworthy of credence.

The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. Furnco Construction Corp. v. Waters, 438 U.S. at 578. The Court of Appeals ruled that even though the magistrate failed to make any findings on

the comparative issues, the magistrate had "considered" the evidence. The petitioner contends "consideration" is not sufficient. It was a error for the trial court to have excluded findings of fact on comparisons from its decision.

The Court of Appeals believed that the trial court had considered the comparative evidence, despite its failure to make any findings on the issues. It based its belief on the magistrate's use of the word "arbitrary".

> A motive which is applied in some cases and not in others, not along lines of principle ..., is arbitrary, and we cannot imagine what the magistrate would have meant by the use of the word if he did not mean that the University's standards of excellence were applied to all equally." (Appendix A, p. 11).

This is a disingenuous interpretation of the magistrate's decision. Arbitrary

means capricious - unconstrained by any principle. Not arbitrary means not capricious: the word cannot be extended to mean that there was no deviation from the principle of equality. Putting the magistrate's words in context shows that he really meant a "reasonable decision .. which I cannot reject as arbitrary," to clarify that he found the reason to be "the true and genuine basis" for the employer's decision (Appendix B, p. 26). A reason can be reasonable, true, genuine, not arbitrary and still be pretextual. As the Court of Appeals itself notes, a reason can be all of these and still be used in a discriminatory manner (Appendix A, p. 9). This is an exact description of the situation that is presented to the Supreme Court today.

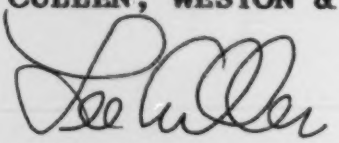
IX. CONCLUSION

For the reasons stated herein, the writ of certiorari should be granted.

Dated this 31st day of October, 1985.

Respectfully submitted,

CULLEN, WESTON & PINES



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October, 1985

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Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-3155

Marion Namenwirth,

Plaintiff-Appellant,

v.

Board of Regents of the University of Wisconsin System,

Defendant-Appellee.

Appeal from the United States
District Court
for the Western District of Wisconsin.
No. 80C340 -- William L. Gansner,
Magistrate.

ARGUED NOVEMBER 14, 1984 --
DECIDED AUGUST 6, 1985

Before CUDAHY and POSNER, Circuit Judges,

and SWYGERT, Senior Circuit Judge.

CUDAHY, Circuit Judge. Appellant Namenwirth was denied tenure at the University of Wisconsin in Madison. After the Department of Labor found that she had been denied tenure because of her sex, she brought this Title VII action in federal court; by agreement, the matter was heard by a magistrate, who found that the university had not discriminated against Namenwirth. We affirm.

I.

Marion Namenwirth was hired as an assistant professor by the Department of Zoology of the University of Wisconsin-Madison in September of 1971. She was the first woman hired in a tenure-track position in thirty-five years, and apparently she was the first person in a tenure-track position ever to be denied tenure by the Department.

Her initial contract was for three years, and it was then to be renewed yearly until she was considered for a tenure. A faculty

member in such a tenure-track position who is not promoted to the tenured rank of associate professor after the sixth year must ordinarily leave the University after her seventh year.

The University of Wisconsin has had a record of sex discrimination. In 1970, prior to Namenwirth's hiring, only 150 of 2000 faculty members at the University of Wisconsin at Madison were female. Of these, half were in traditionally female departments such as nursing and home economics. Nearly all were in the lower ranks. Fifty academic departments had no women faculty members at all, even though between 10% and 38% of the Ph.D.'s being awarded in those disciplines were being awarded to women. Responding to a complaint from a campus action group, the Department of Health, Education and Welfare in July of 1970 began an investigation into sex discrimination at the University. HEW found

that there was a pattern of discrimination against women, and found significant discrepancies between the salaries of males and females in the same positions. In spite of an affirmative action program adopted by the university under pressure from the federal government, the response of the science departments was slow. The magistrate found that in 1978, only six of 323 tenured faculty members in the science departments were women.

The record of the Zoology Department was apparently like that of the other science departments. Before Namenwirth was hired, the only woman to hold a tenure track position in the Zoology Department was Dr. Nellie Bilstad. Dr. Bilstad had received her Ph.D. from the University, and had been hired in 1931. The Department granted her tenure in 1942, and promoted her to associate professor in 1950. She remained an associate professor until 1969, the year of her

retirement, when she was promoted to full professor. The magistrate found that Bilstad had been treated by her colleagues in a patronizing manner. He found that men who were junior to her and who had done little in the way of research rapidly moved beyond her in both salary and rank. He found that Dr. Bilstad was the victim of the purposeful discrimination which reflected the discrimination prevalent in the University and in higher education in general in the time prior to the 1972 extension of Title VII to universities.

In 1971, Namenwirth was the only woman in a tenure track position in the Department. In 1976-77 she was considered for tenure.[1] The usual procedure is for the Department's Salary and Promotion Committee to consider the applicant and make a recommendation to

---

1. The magistrate found that the standards for tenure in the Department did not change between 1968 and 1979.

the Department. The committee in this case favored Namenwirth's promotion by a slight majority but did not recommend promotion to tenure, a fairly unusual procedure. Instead, it prepared a report which, among other things, expressed concern about the strength of Namenwirth's research and publication record. This report ultimately became part of the Department's tenure packet on Namenwirth to the Biological Division Executive Committee, the committee responsible for making a recommendation one way or the other to the Dean of the College of Arts and Letters.

When the Namenwirth candidacy was presented for a vote, the Department voted 11-10 **against** recommending her tenure. Dr. Namenwirth asked for reconsideration. She was asked to speak to the Department on her own behalf; after she spoke, another vote was taken, the result of which was 12-10 in **favor** of recommending for tenure. For some

reason, reconsideration was asked again; the outcome was negative. Dr. Namenwirth requested reconsideration once more, and the final vote was 11-10 in favor of tenure, with three abstentions.

In preparing for the Department's consideration of Namenwirth, the Salary and Promotion Committee had requested letters evaluating Namenwirth's work from scholars outside the department. These letters and other materials relating to research, teaching and committee work were made part of a packet to be sent to the Divisional Executive Committee along with the recommendation for tenure. The packet also included a discussion of the departmental debate, and of the concerns the Department had about the wisdom of granting Namenwirth tenure. It mentioned the closeness of the Department vote. It analyzed the letters from the outside scholars, and pointed out

the concerns those scholars had with Namenwirth's research.

Largely because of the closeness of the vote and the equivocal nature of the Department's recommendation, the Divisional Committee voted to deny her tenure, and the Dean of the College of Letters and Science, accepting the Divisional Committee's recommendation, notified the Department that he would not recommend Namenwirth for promotion and tenure. The Department then insisted that the Division clarify its reasons for denying tenure; the Division, under some pressure from Namenwirth, said that it would reconsider the case if the Department would reconsider it first, resubmitting the case with updated documentation. The Department refused, insisting again on a better statement of reasons for the denial. The Division refused to issue a new statement and told Namenwirth

that there would be no reconsideration of her tenure denial.

Namenwirth appealed to the University Committee in the summer of 1978. The University Committee recommended that the Divisional Committee reconsider the Namenwirth case, using the documents originally submitted by the Zoology Department and new material to be submitted by Namenwirth herself. They also recommended that she be kept on the faculty one more year.

In October, 1978, the Biological Division Committee reconsidered the Namenwirth decision, and again voted against tenure. The Dean of the College, again following the recommendation of the Divisional Committee, declined to recommend her for tenure, and at her request provided her with the following list of reasons:

(1) The narrow majority of the Zoology Executive Committee recommending you for tenure after initially voting against tenure by an equally narrow majority.

I have serious doubts about the wisdom of granting tenure unless a substantial majority of the executive committee recommends it. Unlike the Zoology Department, a number of our departments require a two-thirds majority to recommend tenure, a provision I favor and recommend to all L&S departments.

(2) The negative reviews by the Biological Sciences Divisional Committee, which twice recommended against your tenure by a large margin.

As you know, the four Divisional Committees are the general faculty's major quality control mechanism for faculty appointments to tenure. Each Committee operates across the entire University in its specialized area. A Dean must consult the appropriate Divisional Committee on the qualifications of all

candidates for tenure. Because the Divisional Committee reflects the opinions of scholars outside the Department but from fields closely related to it, and because it is a disinterested body concerned with the overall quality of the faculty of the University, a Dean must consider its advice on tenure cases very seriously.

(3) My concern about the serious budgetary problems of the College and the likelihood of furtner budgetary difficulties if our enrollment should level or decline in the next few years, as seems quite possible. We presently face the need to reduce our staffing in some areas of the College. Under the circumstances, I believe it is especially important that we grant tenure only to those faculty members whose qualifications are beyond question and whose service is likely to be needed regardless of any enrollment fluctuations we can foresee at this time.

A number of men were recommended for tenure in the years surrounding the Namenwirth decision. Perhaps the most pertinent case is that of Dr. Timothy Moermond, who was recommended for tenure in the 1978-79 academic year. Moermond's publication record was similar to Namenwirth's; like hers, it seemed to improve as the time for the tenure decision appproached. Among his letters from outside evaluators, some were positive and some were critical. At the time the department first considered him for tenure, he had no outside grant support. The vote in the department was unanimous in favor of tenure, and he was recommended to the Division Executive Committee.

Namenwirth relies in part on the difference between the way she was treated and the way Moermond was treated to support her claim of discrimination. She points to these particular differences:

-- The rate of publication for each of them increased toward tenure time. In the department's recommendation for Moermond, this was described as an expression of his meticulous approach to research. In the Namenwirth packet, it was described as the result of a last minute effort.

-- The supervision of graduate students is an important part of teaching. The number of graduate students reported as being supervised by Namenwirth was lower than the actual number; according to Namenwirth, the number reported for Moermond was inflated.

-- Each received critical comments from outside evaluators. Negative comments in the Moermond letters were minimized in the summary in his tenure packet sent to the Division. Negative comments about

Namenwirth were highlighted.[2]

In spite of the unamimous recommendation from the Department, the Division Executive Committee found Moermond's record to be weak, and it voted to deny him tenure. Three Zoology faculty members appeared before the committee to argue his case. They presented additional material in his favor, including evidence of a grant he had received after the tenure packet had first been sent on. The Executive Committee reconsidered and recommended Moermond for tenure. Shortly thereafter he was promoted to a tenured rank. The Department had made no such effort in the Namenwirth case.

On July 25, 1979, Namenwirth filed a complaint with the Milwaukee office of the

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2. At the trial before the magistrate, Namenwirth presented the testimony of Judith Laws, a social psychologist who has done research on sex bias in the workplace. Dr. Laws testified that such differences in treatment are indications of the presence of sexual bias.

Federal Contract Compliance Division of the United States Department of Labor, alleging sex discrimination. After an investigation, the Department of Labor concluded that she had been denied tenure because of her sex. This determination was based, among other things, on the poor record of the University in having women in tenured positions and on the failure of the Department to advocate tenure for Namenwirth as aggressively as for Moermond.

In October, 1983, Namenwirth brought an action in the District Court for the Western District of Wisconsin, claiming a deprivation of rights secured by Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. §2000e, et seq. She alleged that the University denial of tenure was the result of disparate treatment. With consent of the parties, the case was brought before a magistrate under 28 U.S.C. §636(c)(1). The

magistrate found that Namenwirth had discharged her burden of establishing a prima facie case of disparate treatment because of sex; that the University had rebutted that case by arguing that her record did not satisfy the standard of excellence required by the University of Wisconsin at Madison; that the University's argument was genuine and reasonable; and that Namenwirth therefore failed to carry her ultimate burden of persuasion. He held that the denial of tenure was not based upon her sex, and dismissed her complaint with prejudice. On appeal, Namenwirth argues that the lower court misapplied the law; and that it was not the duty of the magistrate to inquire into the reasonableness of the motive offered by the University, but rather to examine the evidence that the motive was pretextual.

II.

In a disparate treatment suit the plaintiff is required to establish a prima facie case of discrimination; if she succeeds, the university is called upon to give a nondiscriminatory reason for failing to give her tenure; and, when the university has come forward with such a reason, the burden then rests with the plaintiff to prove discrimination. McDonnell Douglas v. Green, 411 U.S. 792, 807 (1973). To establish a prima facie case of discrimination in tenure, the plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for tenure; (3) she was denied tenure; and (4) an applicant not in the protected class was granted tenure. Cf. Smith v. University of North Carolina, 632 F.2d 316, 332 (4th Cir. 1980). She may attack the motive advanced by the university in one of two ways; she may try to show that the motive is not worthy of belief; or she may try to show that in fact some other

motive explains the university's action better than the motive offered. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In either case she is not called upon to offer direct proof of discriminatory motive. International Brotherhood of Teamsters v. United States, 431 U.S. 324, U.S. 324, 358 n.4 (1977).

To prove that the proffered motive is not worthy of belief, evidence of a comparative sort is appropriate: if others were hired or promoted though by the same reasoning they ought to have been excluded, then the motive is a "pretext." Mozee v. Jeffboat, 746 F.2d 365, 369 (7th Cir. 1984). It is not determinative that the motive as applied to the plaintiff is "genuine," or "reasonable;" if it does not apply to all equally, it does not rebut a charge of discrimination. Thus, suppose a rule forbids the wearing of bracelets near certain machinery. Such a rule may indeed

be reasonable, and the fact that she wore a bracelet near the machinery may be the reason -- a genuine reason -- that a certain woman was fired. But if men are exempted from the rule, whether intentionally or not, so that men who wear bracelets are never fired, then the reason is "pretext" in the technical sense given to that word by the law. Obviously comparative evidence is relevant in determining whether a motive is pretextual. As with the bracelets, the reason in isolation may be both genuine and reasonable, but that is not enough to show that its effect is not discriminatory. To show that, it must be shown that it does not work to the detriment of the protected class alone.

The state of Wisconsin has argued in its brief to this court that comparisons are out of place in a tenure decision. We disgree. Comparisons may be more difficult in the case of professional and academic employment

decisions, but they may be essential to a determination of discrimination; and where they are, and where the evidence is available, they must be made.

III.

The magistrate rejected many of the findings of fact proposed by the parties. The trier of fact has a substantial amount of discretion in this matter. Where it is clear that he has considered the evidence, we will not remand simply to have him produce more detailed findings of fact.

In this case it is true that the magistrate might have made more detailed findings, but it is also clear that he considered and took account of the relevant evidence. He elected not to make many of the findings suggested, many of which dealt with minutiae. He recognized and considered the issue of prior findings of discrimination by the University; the discriminatory treatment of the single woman

to have been tenured by the department; and the comparative evidence concerning the qualification of males tenured at about the time Namenwirth was denied tenure. Since we believe that the magistrate did take account of the evidence, we do not believe that more extensive and detailed findings would change the outcome.

The plaintiff claims that the magistrate applied an incorrect standard. The magistrate found that the motive offered by the University for not offering Namenwirth tenure, that the quantity of her research output and the potential of her projected research did not satisfy the University's standard of excellence, was a reasonable one:

> I am persuaded that the defendant Board's articulated reason for denying tenure was the true and genuine basis for the challenged denial of tenure: a reasonable decision, with which others equipped to render the decision might differ. but which I cannot reject as arbitrary, that Namenwirth did not possess the requisite research credentials to satisfy the tenure standard.

It is true that if the magistrate had addressed himself to the University's proffered motive as a motive in the Namenwirth case only, isolated from other tenure determinations, then he would not have applied the correct standard. As we have already pointed out, to find merely that the motive was genuine (that is, that it really was the motive in this case) and reasonable does not suffice to show that it was not pretextual, in the sense required by law. For if the same explanation,

however, genuine or reasonable, were used to exclude only members of a protected class -- as when, in the example above, women were fired for the wearing of bracelets but men were not -- then in the eyes of the law the explanation would be pretextual. So here, if the proffered motive, however genuine in the particular case, however reasonable in general, operted only to exclude women, it would be pretextual. And if the magistrate considered only the genuineness and reasonableness of the motive in isolation, he did not apply the correct standard.

But the magistrate did apply the correct standard in this case. He might have worded his conclusion a little more felicitously. He might, for example, have been more specific, finding that in the eyes of the department Moermond showed greater promise than Namenwirth. But he **did** consider the comparative evidence; he **did** explicitly find that men in Namenwirth's position would not

have been treated differently,[3] and he concluded that the motive was not

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3. The magistrate's last three findings of fact were the following:

81. In the course of Namenwirth's tenure consideration, a sizable minority of the Zoology Department tenured faculty in fact decided that Namenwirth did not meet the standard for tenure at the UW-Madison, principally because of the deficiencies they perceived in her research output and potential. This was a reasonable decision, and the articulated reason for the decision is not a pretext. If all other factors had been the same, but Namenwirth had been a man and not a woman, the decision of the sizable minority of the Zoology Department would have been the same: to oppose Namenwirth's tenure.

82. In April of 1977 and again in October of 1978, the Divisional Committee in fact decided that Namenwirth did not meet the standard for tenure at the UW-Madison, particularly in the area of research. This was a reasonable decision, and the articulated reason for the decision was not a pretext. If all other factors had been the same, but Namenwirth had been a man and not a woman, the decision of the Divisional Committee would have been the same: to reject Namenwirth's tenure.

83. In May of 1977 and again in February of 1979 Dean David Cronon in fact decided that Namenwirth did not meet the standard for tenure at UW-Madison, particularly in the area of research. This was a reasonable decision, and the articulated reason for it

"arbitrary." A motive which is applied in some cases and not in others, not along lines of principle (or of **acceptable** principle), is arbitrary, and we cannot imagine what the magistrate would have meant by the use of the word if he did not mean that the University's standards of excellence were applied to all equally.

Since we find that the magistrate has adequately considered the evidence, and has applied the appropriate standard, it remains for us to determine whether his finding of no discrimination is clearly erroneous.

IV.

Namenwirth argues that she is qualified and ought to have been tenured. The magistrate found in fact that she was qualified; that was the basis on which he

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(cont.)
was not a pretext. If all other factors had been the same, and if Namenwirth had been a man and not a woman, the decision of Dean Cronon would have been the same: to deny tenure to Namenwirth.

found that she had made a prima facie case. But it does not follow that she ought to have been awarded tenure. Mere qualification depends on objective measures -- the terminal degree, the number of publications, and so on. Tenure requires something more; it requires that the department believe that the candidate have a certain amount of promise. The magistrate compared her record with the record of men who were awarded tenure and determined that the claim that the Department -- and the University -- found insufficient promise in Namenwirth's work was not pretextual. We have examined the records of Namenwirth and the various male candidates, and we cannot say that the magistrate's conclusion is in clear conflict with the evidence.

The evidence consists for the most part of comparative evidence of research quality and potential. That means that it consists in large part of the opinions of academics

who serve not only as experts on qualifications but also as decision-makers in the tenure process. It is not our role, as federal courts have acknowledged, to consider merely the hard evidence of research output and hours spent on committee work, and reach tenure determinations **de novo**. A crucial part of the evidence we rely on is the esteem in which the candidate is held by the very persons making the tenure decision.

Thus, in the case before us, Namenwirth's bid for tenure was defeated primarily by the close departmental vote and the equivocal recommendation which issued from that vote. If we consider the department vote as an assessment of qualification by experts in the field -- and there is no doubt that it is that -- then the University's denial of tenure is based on rather hard evidence that Namenwirth was not as well qualified as those who were granted tenure. But the department

vote is not just an independent assessment of qualifications: it is actually the first step in the decision process, and for most candidates it is the most important step. For many candidates it is the department that actually makes the decisions, and it is clear that it was the department that made the decision in Namenwirth's case.

To allow the decision-maker also to act as the source of judgments of qualification would ordinarily defeat the purpose of the discrimination laws. But in the case of tenure decisions we see no alternative. Tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments. Given the similar research output of two candidates, an experienced faculty committee might -- unite rightly -- come to different conclusions about the potential of the candidates. It is not our place to question

the significance or validity of such conclusions.

But to say all that is only to face up to the problem. The problem remains: faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars. The courts have struggled with the problem since Title VII as extended to the university, and have found no solution. Because of the way we have described the problem -- the decision-maker is also the source of the qualifications there may be no solution; winning the esteem of one's colleagues is just an essential part of securing tenure. And that seems to mean that in a case of this sort, where this is a matter of comparing qualification against qualification, the plaintiff is bound to lose.

But there are other sorts of cases. There are cases that revolve a **pattern** of

discrimination. Hazelwood School District v. United States, 433 U.S. 299, 307 (1977). There are cases in which procedural barriers are placed in the way of members of a certain class. See, e.g. Kunda v. Kuhlenberg College, 621 F.2d 532, 546 (3d Cir. 1980). There are cases that involve outright discriminatory judgments. See, e.g., Lynn v. Regents of the University of California, 656 F.2d 1337, 1343 (9th Cir. 1981), cert. denied, 459 U.S. 823 1982). Thus, although we may despair of extricating discriminatory motives from collegial judgments about potential and worth, the outlook is not entirely bleak.

In this case, there was some evidence of past discrimination on the part of both the University and the Department. That evidence could not offset the rather substantial evidence of the close department vote; and while such a vote might itself be an indication of bias, on the evidence before

him the magistrate was not clearly wrong in deciding that in this case no bias was involved.

While Namenwirth's record was in many ways similar to the records of men who were tenured in the same time period, there were also differences which would have justified the difference in the votes. Moermound, for example, was the editor of a respected professional journal. We have said that we would not review the evidence **de novo**, and we will not; but the clear **drift** of the evidence is this: that the Department anguished over the Namenwirth decision and that in the end its equivocal recommendation to the Division reflected its own uncertainty; that it felt varying degrees of uncertainty about the male candidates, but in no case as serious an uncertainty as in Namenwirth's case; and that its unwillingness to press Namenwirth's case as

strongly as it pressed the cases of the others were based on perceptions of promise.

We conclude that the magistrate's finding of no discrimination was supported by the evidence, and that in this case there was no convincing evidence of other sorts to counter that evidence.

The judgment of the district court is therefore affirmed.

SWYGERT, Senior Circuit Judge, dissenting. The magistrate correctly found that Namenwirth had established a prima facie case of sex discrimination and that the University of Wisconsin discharged its burden to articulate a legitimate, nondiscriminatory reason for its decision to deny Namenwirth tenure by producing evidence tending to show that her research output and potential did not satisfy the University's high standards. But the magistrate's finding that this legitimate, nondiscriminatory reason was not pretextual

was clearly erroneous. I would therefore reverse and remand for a calculation of damages.

The majority wrestles with the problem of how to effectively review tenure decisions given that the dispositive factor in such decisions is the ability of the candidate to win the esteem of the very people whose sexual biases are in question. It concludes that courts must generally defer to the expertise of academic peers in reaching subjective judgments about a candidate's academic standing and potential. Consequently, "in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose." Ante at 14.

While I commend the majority for its

frankness, I dissent from its defeatism.[4]

The notion that tenure decisions must be accorded special deference was put to rest in 1972, when Congress, expressing concern about widespread discrimination against women in academia, removed academia's exemption from Title VII scrutiny. Pub. L. No. 92-261 §3 (codified at 42 U.S.C. §2000e-1 (1982)); H. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2155. "Congress must have recognized that in order to achieve its legislative goals, courts would be forced

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4. In fairness to the majority, I agree that some disparate treatment actions are more likely to meet with success than others. Cf. Davis v. Weidner, 596 F.2d 726, 732 (7th Cir. 1979) (focusing on statistical evidence or lack of procedural safeguards may be winning strategies). One commentator has urged plaintiffs in tenure cases to abandon disparate treatment theories in favor of disparate impact theories, as the employer bears a heavier burden to explain the legitimacy of statistical disparities in the latter context. Batholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945, 1004-06 (1982).

to examine critically university employment decisions." Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979).

In any event, I do not see a qualitative distinction between a tenure decision and any other employment decision. The subjective esteem of colleagues and supervisors is often the key to any employment decision. Yet especially in the blue-collar context, the courts have not hesitated to review with great suspicion subjective judgments that adversely affect minorities.[5] E.g., Albemany Paper Co. v. Moody, 422 U.S. 405, 433 (1975) (criticizing

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5. Although the amendability of subjective job criteria to abuse most often criticized in the disparate impact context, the same criticism would seem to apply in the disparate treatment context. For a disparate treatment case that similarly critize subjective criteria, see Davis, 596 F.2d at 732 (absence of extreme generality of standards for selecting employees combined with lack of minority representation on decisionmaking bodies that apply subjective criteria lend special credence to the claim of disparate treatment).

employer's evaluation of employees as "extremely vague and fatally open to divergent interpretations" and concluding that there is "no way to determine whether the criteria **actually** considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discrimination impact"); Rowe v. General Motors, 457 F.2d 348, 359 (5th Cir. 1972) ("procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are ready mechanism for discrimination"): see generally Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 94 973-78 (1982). Indeed, subjective esteem is more important in certain blue-collar contexts, where, for example lives may depend on the employee's performance and good judgment. Accord Bartholet, supra, 95 Harv. L. Rev. at 983. And because all lawyers

and judges are trained in academia, courts are better equipped to scrutinize academia decisionmaking than decisionmaking in the perhaps less familiar blue-collar context. Id. at 979.

Of course, to recognize that tenure decisions are not different in kind from other employment decisions is not to diminish the difficulties that are common to the judicial review of all subjective employment decisions. But it does allow us to resort to some useful tools that we have applied to strike down employment practices in the blue-collar context. The first tool is not to abandon our common sense. Although this is not a disparate impact action, we are entitled to draw a strong inference of discriminatory treatment from disparate impact. See Davis, 596 F.2d at 732; see also supra note 2. Namenwirth was the second woman ever appointed to a tenure track position by the Zoology Department. The

first had been the victim of sex-based discrimination throughout her carrer. Finding of Fact No. 40. Namenwirth was the only person ever to be denied tenure by the Department. And despite the University's claim that events during the 1970's caused the University to grant tenure less liberally, male candidates who were reviewed immediately before and after Namenwirth were granted tenure. Nor is Namenwirth a statistical anomaly. As of 1978, despite pressure from Congress and the HEW to correct its past history of discrimination, only six of 323 tenured faculty members in the University's science departments were women. Finding of Fact Nos. 41-47.

A second tool is to correct for our lack of academic expertise by relying on outside experts. Tenure decisions are especially susceptible to this approach because in assessing research output, the University is concerned with how the research is being

received in the academic community as a whole. One objective means of assessing this reception is the number of publications in journals generally regarded as prestigious. Another admittedly more subjective but nevertheless reviewable means of assessing research output are the opinions of outside experts solicited by the University. Under both criteria, Namenwirth's research output was superior to that of Moermond, a male colleague tenured several months after Namenwirth's review.

At the time of her review, Namenwirth had published four articles in Developmental Biology, the most pretigious journal in her field.[6] One other article was listed as

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6. Namenwirth's publications are listed in Plaintiff's Exhibit 53 at H-8. One of the four articles was listed as "in press" at the time of her tenure review. That Developmental Biology is the most prestigious journal in the field was uncontested. See, e.g., Transcript of Proceedings ("T."). Vol. 6 at 31 (testimony of Professer Auerbach).

submitted to Developmental Biology, and she had also published a discursive article that was not considered an academic research piece. Moermond had published only two articles in prestigious journals of comparable quality to Developmental Biology.[7] Another article was published in the Journal of Herpetology, which one reviewer had described as a "second rate" journal.[8] Like Namenwirth, Moermond had also published one popular article. Moermond listed two other articles as submitted for publication.

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7. Moermond's publications are listed in Plaintiff's Exhibit 120 (Curriculum Vitae at p. 5). Moermond's two articles in Ecology and Behaviour were both listed as "in press." One of Moermand's negative reviewers conceded that both journals were "well respected, refereed journals." Id. (Letter of Henry M. Wilbur) See also Id. (Letter of M. F. Willson) (Ecology is the major publication outlet for U.S. ecology); T., Vol. 16 at 29-30 (testimony of Professor Porter) (Ecology is a pretigious journal).
8. Plaintiff's Exhibit 120 (letter of Henry M. Wilbur). This description was unrebutted.

Turning to more subjective criteria, Namenwirth and Moermond received mixed reviews from outside scholars. The clear consensus with respect to both candidates was that their research output was low in quantitive terms. Issue was joined, then, on whether the quality of their output was sufficiently high to counterbalance quantitative deficiencies. Three of Namenwirth's reviews could properly be described as negative. Professor Blackler was highly critical of Namenwirth's failure to publish more and questioned the ultimate value of her approach. Nevertheless, he acknowledged Namenwirth's technical innovations and conceded that although the ultimate success of her approach to fundamental biological issues was a bad gamble, any success would be "exciting." Similarly, Professors Mahowald and Smith expressed grave reservations about the ultimate success of Namenwirth's regional

localization work. Yet both were constrained to acknowledge the high quality of the work she had completed. Four reviewers recommended tenure after stressing Namenwirth's enthusiasm and innovativeness. Plaintiff's Exhibit 57 at H-68, H-77, H-78, H-80. One of those reviews was a rave, characterizing Namenwirth's limb regeneration work as the "most significant new work in the last 10 years."[9] A final reviewer characterized Namenwirth's research output in positive terms, but concluded that quantitative concerns made tenure premature. Plaintiff's Exhibit 57 at H-71.

Three of Moermond's reviews were negative. These negative reviews were

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9. Plaintiff's Exhibit 57 at H-80. The rave review was particularly worthy of credence because its source was the Chairman of the Department of Anatomy at Harvard Medical School and an acknowledged leader in the field. See T., Vol. 1 at 117-18; T., Vol. 5 at 50 & 141.

different in kind from those received by journal.[10] Like Namenwirth, Moermond had also published one popular article. Moermond listed two other articles as submitted for publication.

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new work in the last 10 years."[11] A final reviewer characterized Namenwirth's research output in positive terms, but concluded that quantitative concerns made tenure premature. Plaintiff's Exhibit 57 at H-71.

Three of Moermond's reviews were negative. These negative reviews were different in kind from those received by Namenwirth. Even the negative reviewers had to acknowledge Namenwirth's innovations and originality, and that she had at least published work that was recognized in the field. The negative reviews of Moermond, by contrast, criticized Moermond precisely because he had done nothing original, innovative, or which had had any impact on

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11. Plaintiff's Exhibit 57 at H-80. The rave review was particularly worthy of credence because its source was the Chairman of the Department of Anatomy at Harvard Medical School and an acknowledged leader in the field. See T., Vol. 1 at 117-18; T., Vol. 5 at 50 & 141.

the field.[12] Three of the positive reviewers were willing to recommend tenure on the basis of Moermond's established reputation as an ecologist.[13] Two others recommended tenure

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12. See Plaintiff's Exhibit 120 (letters of Professors Wilbur, James, and Roughgarden). Although Professor Wilbur acknowledged that Moermond was a good writer who was sufficiently "competent" to publish at least two articles in well-respected journals. he concluded that even these articles were "neither innovative nor definitive." Professor James similarly noted Moermond's lack of "originality" and also criticized Moermond's failure to show "critical thinking." Dr. Roughgarden concluded that "Dr. Moermond would definitely not attain tenure at Stanford on the basis of this record" and that "I doubt that he could be considered among the top twenty ecologists of his age class working with terrestrial vertebrates. He will never approach the international stature of scientists in your department like Warren Porter."

13. Plaintiff's Exhibit 120 (letters of Professors Schoener, Fagen, Willson). Professor Schoener believed that although Moermond's articles in Ecology and in Behavior were still in press, they would be highly influential and had already attracted recognition in the field, apparently through informal circulation. Professor Fagen stated that "Tim Moermond's professional reputation is well established and has long since been recognized outside the Department." Citing Moermond's appointment as an editor of Ecology, Professor Willson

on the basis of his research potential.[14]

(cont.)
concluded that "Tim is certainly recognized professionally beyond his own department."

Like Namenwirth, Moermond did receive one "rave" review: that of Professor Schoener. Schoener stated that "Moermond is likely the best person over a certain interval of the individual-population-community-ecology continuum" and that he was "clearly on his way to becoming a major figure in the area of ecology and evolutionary biology" (emphasis added). It is interesting to note, however, that Schoener had to base his conclusions on research potential rather than output. Moermond's best articles had not been published, so it was premature to conclude that Moermond was already a major figure in any respect. Namenwirth, by contrast, had already established herself in the limb regeneration area with articles in print. See supra note 6 and accompanying test.

14. Professor Williams recognized Moermond's lack of publications, but concluded that "[h]e begins, as your Department's statement requires, to be recognized as the very good man that he is" (emphasis is original). Profesor Werner wrote a highly positive recommendation, praising Moermond's breadth of interest and originality. He was constrained to conclude, however, that "Moermond's publication record at this stage is at obvious odds with his capabilities and industry as a scientist." Based on his knowledge of Moermond and the preliminary reception of Moermond's unpublished work,

In sum. Moermond had published fewer articles in prestigious journals, and his current impact on the field was open to serious question. Namenwirth, by contrast had published more articles in prestigious journals, and none of the reviewers could question that her research had had an impact on the field. The concern about Namenwirth was whether she could follow up on her work in any meaningful way. But with respect to research output exclusively, Namenwirth was decidedly superior to Moermond. The court needs no special expertise to reach such a judgment; all that is required is a willingness to read the expert judgments of others and determine what conclusions about the relative merits of Namenwirth and Moermond could plausibly be drawn therefrom.

(cont.)
Werner concluded: "I think Moermond has the tools and intellect to be an important ecologist and will become increasingly recognized as he gets his work into the literature." Plaintiff's Exhibit 120.

To be sure, given the University's high prestige, Namenwirth and Moermond were both marginal candidates; but it was clearly erroneous to find that Moermond had a superior research record that justified a different tenure decision in his case.

The more difficult question is whether Moermond enjoyed a sufficiently superior research potential to justify the disparate treatment. The majority ultimately relies on this factor to affirm the magistrate's findings. Ante at 13-14. The University's judgment in this regard is subjective and based on a considerable body of expertise. But the University does not express its judgment in a foreign language. No institution is better equipped than the impartial finder of fact -- whether it is a jury or a judge -- to evaluate whether stated reasons plausibly follow from stated premises and whether the stated motive of human behavior is the true motive.

Several of the factors that were urged as distinguishing Moermond's potential from that of Namenwirth can be dismissed in summary fashion. First the University stresses that Moermond's future research would definitely be funded because he received a large grant from the National Science Foundation shortly before he was granted tenure. However, this was not known to the Department at the time it unanimously recommended Moermond for tenure. Rather, at the time of their respective tenure reviews at the Departmental level both had generated roughly the same amount of outside grant support.[15]

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15. Namenwirth had received $63,000 in outside grant funding while at Wisconsin. Plaintiff's Exhibit 53 at H-11. Moermond had received three grants totalling $74,695. Plaintiff's Exhibit 120 (Curriculum Vitae at 2). Both had allowed their grants to expire. Moermond listed a new grant proposal as submitted. Namenwirth withdrew her proposal for a renewal of her grant pending publication of the research funded by the original grant, T., vol. 12 at 14 (testimony

Second, the University argues that Moermond had a larger stable of graduate students, while Namenwirth's lab appeared to be relatively inactive.[16] Thus, on the one hand, the University urges that Moermond could generate more research by relying on a greater supply of graduate students, yet on the other hand, Namenwirth is criticized for stealing the work of her graduate

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of Namenwirth), inasmuch as such publication was a prerequisite for a renewal, T., vol. 16 at 106-09 (testimony of Dr. Borisy).

Namenwirth was roundly criticized for allowing her grant to expire and for lacking any current funding. T., Vol. 8B at 60 (testimony of Hanson); T., Vol. 14 at 88-89 (testimony of Abrahamson); T. vol. 16 at 13-14 (testimony of Porter); T., Vol. 17A at 32-33 (testimony of Auerbach). Moermond's lack of current funding was not discussed and apparently, was considered unimportant. Stanley Dodson, the last candidate to be reviewed before Namenwirth, was granted tenure even though he had never received any outside grant money. T., Vol. 3 at 14 (testimony of Dodson). His lack of funding was not mentioned in his tenure documents. Plaintiff's Exhibit 119.

16. T., Vol. 8B at 23-26 (testimony of Hanson); T., Vol. 13B at 94 (testimony of Abrahamson); T., Vol. 17A at 32-33 (testimony of Auerbach).

students.[17] In any event, the Department of Labor found [18] that the number of graduate students who actually stayed on to receive degrees in both labs--a better indication of research potential inasmuch as those students produced extensive research these

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17. Professor Blackler, the most negative outside reviewer, expressed doubts about how much credit should be given Namenwirth for articles she coauthored with graduate students. Plaintiff's Exhibit 57 at H-67, H-68. Although at least two Department members took exception to this suggestion that Namenwirth had pirated work from others, T., Vol. 4 at 99-100 (testimony of Nees); T. Vol. 8B at 42-43 (testimony of Hanson), the Department took care to emphasize the role of others in contributing to Namenwirth's work. Thus, in the cover letter to Namenwirth's file, the Department characterized Namenwirth's egg-slicing work as having been completed by Terry Moen, a laboratory technician, and Namenwirth's regeneration work was characterized as "reflecting graduate studies plus graduate student Master's research (Dunis)" Plaintiff's Exhibit 53 at H-7.

18. Namenwirth filed a sex-discrimination complaint with the Labor Department's Office of Contract Compliance Programs. The agency found that the University had denied Namenwirth tenure on the basis of her sex. Its findings are reprinted in Plaintiff's Exhibit 139.

that could be turned into published works[19]--was comparable.[20]

Third, the Department stresses that Moermond's appointment, at a relatively youthful age, as an editor of Ecology was a good indication that he was an up-and-coming force in the field. Yet, neither the majority, see ante at 15, nor the Department even considered Namenwirth's comparable achievement as a recognized authority in the regeneration area, whose work was characterized as the "most significant new work in the last 10 years." see supra note 6 and accompanying text, and who routinely reviewed manuscripts for the editor of Developmental Biology. Plaintiff's Exhibit 57 at H-80.

Ultimately, the University does rely on one factor distinguishing Namenwirth that

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19. See T., Vol. 8B at 23-26 (testimony of Hanson).
20. Plaintiff's Exhibit 139 at text accompanying notes 7-8.

is more difficult to dismiss. Several members of the Department testified that Namenwirth's immediate research plans with respect to regional localization were so ambitious as to be naive. The Department simply did not believe that Namenwirth, admittedly a marginal tenure candidate, was capable of undertaking an enormous research project that dealt with the most fundamental problems of developmental biology.[21]

Although this court should hestitate to second-guess such a judgment, we should also recognize that the Department's judgment of its employee's potential is not different in kind from any other employer's judgment of potential. It is generally recognized among industrial psychologists that the best predictor of future success is past

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21. E.g., T. Vol. 15 at 15, 17 (testimony of Abrahamson); T., Vol. 16 at 17-18 (testimony of Porter); T., Vol. 16 at 95 (testimony of Borisy); T. Vol. 21 at 90-91, 94, 97 (testimony of Sonneborn).

performance. See, e.g., R. Guion, Personnel Testing 380 (1967); Owens, Background Data, in Handbook of Industrial and Organizational Psychology 609, 625 (M. Dunnette Ed. 1976); Bartholet, supra, 95 Harv. L. Rev. at 975 & n.101. Given that Namenwirth's past research record was superior to that of Moermond, the Department's failure at least to accord Namenwirth the benefit of the doubt is suspicious.

In any event, I am willing to concede that it is entirely possible that an unbiased Department may well have seen more promise in Moermond's research plans despite his inferior past record. What troubles me, and what I believe is the key to this case, is the Department's failure even to consider Moermond's weak points Moermond's research plans were hardly modest. His work occupied the "individual-population-community-ecology continuum" and he combined "behavioral ecology" with "functional

morphology" and physiological ecology." See Plaintiff's Exhibit 120 (letter from Professor Schoener). Yet, rather than criticize Moermond for his "naivete" or question his ability to accomplish his broad reseach goals given his marginal past record of output, the Department praised him for his breadth of vision.[22] If in fact rigorous standards for assessing research potential were applied to all candidates, one would have expected at least some discussion of Moermond's liabilities in this regard.

When it reviewed Namenwirth, the Department extensively debated her research potential and, after four ballots, recommended tenure by a one-vote margin. This equivocal recommendation combined with the failure of the Department to fight for

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22. E.g., Plaintiff's Exhibit 120 (Porter's cover letter at 2 (quoting with approval comments by graduate students); id. (letter from Emlen); id. (letter from Dodson); T., Vol. 15 at 169 (testimony of Plaut).

Namenwirth when its recommendation was reviewed and overruled by the upper levels of the University hierarchy caused Namenwirth to be denied tenure. Ante at 13.[23]

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23. There can be no question that the Department's "recommendation" for tenure was the proverbial kiss of death. The Divisional Committee that reviewed the Department's recommendation was a quality control device that denied tenure to twenty-five percent of all applicants, despite strongly positive recommendations by the relevant departments in most cases. See T., Vol. 8B at 28 (testimony on Hanson). To make matters worse, Professor Burns' cover letter in Namenwirth's tenure packet emphasized the Department's ambivalence:

> Our past recommendations to promote have been by large majorities. What perhaps is worth noting here is not so much the closeness of the vote, but the absence of really strong convictions on the part of the voters that they are absolutely right or secure in the position they have taken. This ambivalency of the faculty in itself tends to weaken a posture in defense of not reviewing an appointment. In view

When Moermond was reviewed, the Department failed even to discuss the possibility that his research potential might be low in view of his broad ambitions and his marginal past record. Nor was the quality of his past work questioned. Rather, the Department's primary concern was how to secure the University's approval of tenure given Moermond's low quantity of publication. And in contrast to the agonizing debate and multiple ballots that characterized its review of Namenwirth, the Department unanimously voted in favor of tenure for

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> of the serious consequences to Dr. Namenwirth's career that are involved in a decision of this magnitude. I would have hoped for [a] stronger mandated.

Plaintiff's Exhibit 53 at H-14. Rather than unambiguously recommend Namenwirth, Professor Burns expressed his "hope" that the Divisional Committee would "concur with the finally expressed will of the majority of the Zoology Faculty." Id.

Moermond on the first ballot after no debate.[24] Furthermore, after a vigorous lobbying effort, it persuaded the University

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24. Professor Neess testified that at the very beginning of Moermond's review, some faculty members questioned Moermond's work as too theoretical. Nevertheless, the faculty quickly established a general agreement that Moermond was a strong candidate for tenure. T., Vol. 4 at 51-52, 64-65. Although some faculty members initially were concerned about Moermond's paper credentials, those concerns were not voiced, and Moermond's record and potential were not subjected to the kind of scrutiny that characterized Namenwirth's review. The faculty as a whole was willing to defer without question to the strong and unequivocal support of the ecologists who worked most closely with Moermond. See T., Vol. 8B at 33 (testimony of Hanson); T., Vol. 15 at 71-72 (testimony of Abrahamson); T., Vol. 16 at 156-57 (testimony of Ris); T., Vol. 17B at 59 (testimony of Stretton). In sum, Moermond's marginality was neither recognized nor discussed, whereas even the strongest supporters of Namenwirth characterized her as a marginal candidate. See T., Vol. 4 at 65 (testimony of Neess); T., Vol. 17B at 43 (testimony of Stretton); T., Vol. 18 at 138 (testimony of Dodson).

of ratify its decision.[25]

In sum, the Department was faced with two marginal candidates for tenure.[26] If different perceptions of research potential were the real reason for the different tenure decisions in each case, there would have been at least some discussion of Moermond's liabilities that paralleled the discussions in Namenwirth's case. Something other than strict standards for research potential

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25. The Divisional Committee initially voted to deny tenure despite the Department's unamious recommendation. The Department urged the Committee to reconsider. Three Zoology professors appeared before the Committee to argue Moermond's case and additional material was presented in his favor. The Committee then voted to uphold the Department's recommendation. By contrast, when the Committee initially rejected Namenwirth, the Department merely asked for a clarification of reasons and refused the Committee's invitation to reconsider the case. In the end, Namenwirth received a second, though again unfavorable review only because University officials ordered it. Ante at 4-5.

26. Given the University's initial rejection of both candidates, any other conclusion would be clearly erroneous.

caused the Department to ignore Moermond's marginality completely. Based on my review of the entire record, I am left with a "definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The University s explanation that Namenwirth's lower research output and potential justified a different tenure decision in her case is pretextual, and the magistrate's finding to the contrary should be reversed as clearly erroneous.

It is, of course. possible that some legitimate reason other than its perceptions of research output and potential caused the Department to grant tenure to the male candidate rather than the female candidate. It is clear from the record that many members of the Department were fond of Moermond. Even though personal popularity would be a poor reason to promote one candidate over another and even though such a criterion is

not recognized by the University, this court does not review the wisdom of any particular tenure decision; we merely determined whether the decision was the product of invidious discrimination, not if it was wise. Yet the University did not argue that it promoted Moermond on sexually-neutral popularity grounds. It argues, instead, that it promoted Moermond solely because he possessed superior research output and potential. Because the only legitimate, nondiscriminatory explanation of the tenure decisions proffered by the University is pretextual, Namenwirth is entitled to prevail on the merits.

In any event, it is difficult to believe that any factor other than sex explains the double standard applied by the University in its reviews of Moermond and Namenwirth. Although many of the faculty members were clearly appalled by Namenwirth's allegations of sex bias, sex bias need not

be conscious to be actionable. The most likely explanation for the events at bar is that Namenwirth was scrutinized by the Department because she was a woman breaking new ground.[27] The Department wanted, at

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27. Although one female professor had previously been tenured, she had been the victim of sex discrimination throughout her career and had since retired. Finding of Fact No. 40. Namenwirth was therefore the first woman to be hired with the expectation that she would compete on equal terms with her male peers. The Department frankly acknowledged that "no faculty member in our department in recent years has had his credentials and activities so thoroughly examined as Dr. Namenwirth." Plaintiff's Exhibit 53 at H-12. Professor Neess remarked:

> In spite of our attempts to convince ourselves otherwise, we have in fact invented a new procedure to use in considering her promotion. To the best of my recollection, we have not before made the same effort to collect opinions from people outside the Department, especially not from people with no previous associations or who would not be expected in advance to favor

least consciously,[28] to accept a woman as a peer, but it did not want to lower its standards for the sake of affirmative action.[29] Accordingly, when Namenwirth

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promotion.

Plaintiff's Exhibit 59.

28. This may be a charitable assumption. It was undisputed that one professor told Namenwirth that the only reason she was considered for a job at Wisconsin was her sex. T., Vol. 8A at 17; but see T., Vol. 18 at 68 (comment was meant in jest). Namenwirth also introduced evidence tending to show that another member of the Department seriously discussed whether women were equipped to "do science." T., Vol. 11 at 17.

29. Thus, when arguing for the advantages inherent in a sexually-integrated department, Professor Neess saw the need to qualify his remarks: "For one, she [Namenwirth] is a woman, and I make this remark not in a simple-minded ERA spirit." Plaintiff's Exhibit 59. The perception that affirmative action posed a grave threat to the meritocratic ideals of the Department perhaps explains Professor Auerbach's comment that he operated on the assumption that the University would never deny tenure to a woman. T., Vol. 6 at 43. Thus, Auerbach did not see the need to forge some consensus about Namenwirth's qualifications and attempt to sell it to the Divisional Committee, as the Department had done with similarly situated male candidates. Rather, the Department had to scrutinize Namenwirth because it stood as the last bulwark of

turned out to be a maringal performer, many members of the Department refused to give Namenwirth the benefit of the doubt.[30] But

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(cont.)
meritocratic ideals in the face of a University hierarchy willing to rubberstamp the recommendation of any woman for tenure.

30. Because Namenwirth was a marginal candidate, any procedural that focused attention on her faults would be fatal to her chances. Her faults were mangified because the Department felt compelled to subject her entire record to the most rigorous scrutiny, in part because she was a unique kind of a candidate, see supra note 22, and in part because the Department perceived itself as the last bastion of meritocracy, see supra note 24. Thus, Professor Neess wrote:

> Our motives in subjecting Marion [Namenwirth] to what appears to me to be an unprecedented and unusually severe test may have been quite innocent, designed, as we seem to be telling ourselves now, only to give her more than the usual opportunities to receive favorable references. On the other hand, it could also be interpreted as though it had been intended to work just the other way around, all the more so because we appear to have wanted to weight [sic]

when a similarly-situated male turned out to be a marginal performer, i.e., Moermond, the entire Department was willing to give him the benefit of the doubt. In short, given Namenwirth's unhappy role as a pathbreaker, she had to perform better than a male to succeed. Such unequal treatment--however unconscious or subtle--violated Title VII.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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(cont.)

> the unfavorable material that came in much more heavily than the favorable.

Plaintiff's Exhibit 59.

Because of Moermond's sex, the Department did not feel compelled to subject him to the same kind of rigorous scrutiny. Accordingly, his marginality was never discussed and his faults never brought to light. The Department soon convinced itself that Moermond was an exceptional candidate.

85-909 (3)

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARION NAMENWIRTH

Petitioner

vs.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM

Respondent

APPENDIX B TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Lee Cullen

Cullen, Weston & Pines
20 North Carroll St.
Madison, WI 53703
(608)251-0101

October, 1985

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARION NAMENWIRTH. *

Plaintiff, *

vs. *

BOARD OF REGENTS *
OF THE UNIVERSITY
OF WISCONSIN SYSTEM, *

Defendants. *

DECISION AND ORDER
FOR JUDGMENT
CASE NO. 80-C-340-G

This is an action for equitable relief -- including job reinstatement and back pay -- brought by the plaintiff to redress the alleged deprivation of rights secured to her by Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, et seq. Plaintiff has claimed that she was discrimated against on the basis of her sex when the defendant refused to promote her from the rank of assistant professor to the

tenured rank of associate professor. Jurisdiction is present. 42 U.S.C. §2000e-5(F); 28 U.S.C. §1343(4). The case is before me as magistrate upon the consent of the parties pursuant to 28 U.S.C. §636(c)(1).

A lengthy court trial having been conducted and the parties having submitted voluminous post-trial arguments, the case is now ready for decision.

FINDINGS OF FACT

The following findings of fact are numbered consecutively. They include findings that I have formed and phrased on my own initiative, as well as those findings that I have accepted from among those proposed by the parties. Some of the parties' proposed findings have been accepted in the precise form drafted by counsel. Others have been modified, either on my own initiative or as a result of my consideration of objections raised by the

opposing party. A great many others have simply been rejected.[1]

In any event, the findings that follow constitute my findings of material fact,

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1. The following remarks are not made gratuitously, but as (1) an intended gentle criticism of counsel, and (2) an explanation of why the total number of findings in this decision is considerably smaller than the number proposed by counsel.

Given the conscientiousness and thoroughness of counsel, and given the complexity of the factual information they have had to master to prepare for and present this case, it is not surprising that their proposed facts (and their objections to their counterpart's proposed facts) are as numerous and as lengthy as they are. But in all complex matters there is a tendency to lose the forest for the trees. The adversarial system sometimes magnifies that tendency, as I think it did in this case. Counsel have presented the court with proposed facts and objections far greater in number than those necessary to discharge their respective burdens of proving certain material objective facts. Moreover, the character of their proposed facts was often not helpful, sometimes because the proposals were mere summaries of testimony and sometimes because they were too argumentative in form.

It is for these reasons that I have rejected many of counsel's proposed facts as not genuinely material or relevant, and have significantly modified others.

made pursuant to Rule 52(a), FED.R.CIV.P., on the basis of the entire record in this case. In making these findings and in declining to make others, I have required the plaintiff to prove by a preponderance of the evidence those factual propositions necessary to entitle her to the relief sought, and I have required the defendant to prove by a preponderance of the evidence those factual propositions necessary to its defense.

1. When this action was commenced plaintiff Marion Namenwirth was a resident of Madison, Wisconsin. She is a woman.

2. Defendant, the Board of Regents of the University of Wisconsin System, (hereinafter referred to as "the Board") is a body corporate created by the statute and governed by Chapter 36, WIS. STATS. The Board governs the public system of higher education in Wisconsin called the University of Wisconsin System. The Board is an

employer as defined in 42 U.S.C. Section 2000e(b), as amended.

3. A major campus of the University of Wisconsin System is the University of Wisconsin-Madison.

4. At all times relevant to this case there existed at the University of Wisconsin-Madison a Department of Zoology, (hereinafter referred to as "the Department"); a Biological Sciences Divisional Executive Committee (hereinafter referred to as "the Divisional Committee"), whose membership changes by one-third each year; the Dean of the College of Letters & Sciences, E. David Cronon; the University Committee, which is a committee elected by the University faculty to govern the faculty; and the Chancellor. All of the individuals or the committees named, and others named or described above, who were involved in employment decisions relating to Namenwirth, including her tenure review,

were employees of the Board defined by Title VII.

5. At all times throughout Namenwirth's tenure proceedings, the Chancellor of the University of Wisconsin-Madison was Irving Shain.

6. Appointments are made to the faculty at UW-Madison by the Board at the assistant professor level after affirmation recommendation of the Department to the Dean, after the approval by the Dean, and approval of the Chancellor.

7. At UW-Madison an assistant professor in Zoology is promoted to tenure with the rank of associate professor by action of the Board only after the Department of Zoology recommends tenure to the Dean, after the Dean seeks the advice of the Divisional Committee on the teaching, research and service of the candidate, and after the Dean makes a favorable recommendation to the Chancellor. An

assistant professor is considered for promotion to tenure not later than the sixth year in rank as an assistant professor.

8. Namenwirth received a B.A. degree from the University of Minnesota in 1961, and a Ph.D. degree in Zoology from Indiana University, Bloomington, Indiana, in 1969. She spent two years (1969-71) doing postdoctoral work in biochemistry at the University of Washington, Seattle, Washington. She applied for and was hired as an assistant professor in the Department of Zoology at UW-Madison, beginning September, 1971. Her educational background, publications and teaching experience as of 1971 were stated on her curriculum vitae submitted to the Department upon her application for the position.

9. Plaintiff was notified of the Department decision to give her a three-year appointment (three academic years) and the terms of the appointment by a letter from

the then-Department Chairman, Professor William C. Burns, dated March 26, 1971. The appointment letter advised Namenwirth, in part:

> Reappointment beyond the period of three years depends upon an evaluation made in due course by the departmental Executive Committee.
>
> The department expects that you will develop a new course in introductory general biology that would be offered at least one semester each year. In addition to your teaching elementary biology, we wish that you will offer a course more specifically related to your own special field in developmental biology. This may be designed in concert with others or taught solely by yourself. We further expect that you will participate in graduate student seminars in your reseach field.

10. As of September, 1971, Namenwirth was the only female assistant professor in

the Department of Zoology, a multi-disciplinary department which exists within the College of Letters & Science at the University of Wisconsin-Madison, and is part of the Biological Sciences Division for tenure review purposes. As of that time, she was the only woman ever hired by the Zoology Department after a national search, who had a Ph.D. granted by an institution other than the University of Wisconsin-Madison. As of that time, the Zoology faculty consisted of 23 males.

11. The members of the Department of Zoology worked in disparate geographic locations on the University of Wisconsin-Madison campus, but primarily in the Zoology Research Building located on Johnson Street between Charter and Mills, in Birge Hall on Bascom Hill in the main part of the campus, in the Molecular Biology lab on the Agricultural campus, and in the Limnology Building on the shore of Lake Mendota. The

subspecialties in the Department are Developmental Biology, Animal Behavior, Limnology, Molecular Biology, Cell Biology, Ecology, Genetics, Neurophysiology and Endocrinology. The faculty, tenured and non-tenured, met on a weekly basis at Noland Hall, which is adjacent to Zoology Research and connected to it by a basement hallway. For many members of the Zoology Department, the weekly faculty meetings were their only contact with their colleagues from other locations. Noland Hall is also the site where the bulk of the Zoology courses are taught. Courses are taught by faculty members, sometimes with the help of lab preparators and teaching assistants. Teaching assistants are graduate students from all subspecialties. Their major professors might be located in any of the geographic locations of the Department, but the TA s would have frequent contact with one another at Noland Hall.

12. Namenwirth worked at the Zoology Research Building along with numerous other scientists, including Professors Robert Auerbach, David Sonneborn, Jack Lilien, Hans Ris, Anthony O.W. Stretton, Seymour Abrahamson, Walter Plaut and Warren Porter. Her office and lab were in the basement of the Zoology Research Building (20 Research), space vacated by a departing professor in the summer of 1971.

13. Namenwirth is a developmental biologist, which is a "laboratory" science discipline. A difference in the disciplines in the Zoology Department exists between laboratory researchers and field researchers. Developmental biologists are laboratory researchers. Ecologists are generally field researchers.

14. Professors Sonneborn, Auerbach and Lilien are also developmental biologists with offices and labs in Zoology Research on the first, second and third floors

respectively. Professors Plaut and Ris are cell biologists. They are located on the third floor. Professor Abrahamson is a geneticist. His office and lab are located on the second floor. Professor Stratton is a neurophysiologist. His office and lab are located on the first floor. Professor Porter is an ecologist. His office and lab are located on the second floor.

15. The interactions between faculty in the Zoology Department were generally informal, conditioned by physical proximity; that is, floor and location. There was also interaction between people in the various laboratories.

16. Namenwirth's opportunity for such informal interactions with other faculty members was reduced by her office and lab location in the basement of Zoology Research. Her relations with her colleagues were cordial, however.

17. At the time of her appointment, Namenwirth was the only female member of Zoology Department faculty who was on tenure track; meaning that at or before the end of her sixth year, she was to be evaluated and considered for tenure. All the male professors in the Department had similarly been hired on tenure track.

18. The standards for tenure in the Department of Zoology did not change between 1968, when Professor Sonneborn was tenured, and 1979, when Dr. Moermond was considered for tenure. The application of those standards became more exacting, however, beginning in the mid-1970's, as available funds and positions began to shrink.

19. The primary expressed standard for all those considered for tenure at the UW-Madison during those years was: excellence in either teaching or research, and adequacy in the other as well as in service. At the UW-Madison research was emphasized over

teaching and service in the application of this standard. Because of this emphasis, the primary tenure consideration throughout the period of Namenwirth's tenure review was the tenure candidate's research potential, as demonstrated by the candidate's scholarly publications, and the presence or absence of grant support for research.

20. The tenure standard embodies a subjective element. Reasonable persons engaged conscientiously in an effort to apply the standard to a particular tenure candidate, such as Namenwirth, could reasonably differ in their conclusions. Any one person conscientiously engaged in an effort to apply the standard to different tenure candidates over a period of time could reasonably apply the standard somewhat unevenly among the candidates.

21. Every tenure track faculty member is considered to be eligible for tenure at the end of the fourth, and no later than the

end of the sixth year in rank as an assistant professor. A beginning assistant professor is normally appointed for an initial three-year term. A review after the third year determines whether the assistant professor may continue. Thereafter, he or she is reviewed annually for possible reappointment for an additional year, nonretention, or possible promotion to associate professor. After her third year, Namenwirth was evaluated and her contract renewed, upon the unanimous recommendation of the Zoology Department. Namenwirth's appointment was subsequently extended for a fifth and sixth year, on both occasions by unanimous recommendation of the Zoology Department.

22. Annual reviews of faculty for contract renewal and ultimately for tenure are made by a Salary and Promotion Committee of the Zoology Faculty.

23. The tenure process at the time relevant to his case generally operated as follows:

The Zoology Department Salary and Promotion Committee, after reviewing a tenure candidate's qualifications, decides whether or not to recommend tenure to the tenured department faculty, the Faculty Executive Committee.

The tenure recommendation is considered at a faculty meeting. The presenter of the Salary and Promotion Committee tenure recommendation is closely questioned.

The tenured faculty then votes. If the vote is favorable, the Department chairman, along with the person or persons most familiar with the candidate's record prepares a document addressed to the Dean and the Executive Committee of the Biological Sciences Division (the Divisional Committee). This document is intended to advance the Department's

recommendation for the grant of tenure, but it is also intended to contain a complete and balanced analysis of the candidate's performance. If there was significant minority opposition within a department to a candidate's tenure, a tenure document that did not describe and discuss this opposition would be considered incomplete.

The Divisional Committee may support or override the department's recommendation. If an initial recommendation is not accepted by the Divisional Committee, it can be reconsidered at the request of the department. A telephone call is made to the department chairman to inform him of a rejection before the formal decision is transmitted. This gives the department time to request reconsideration.

The Divisional Committee forwards a final recommendation to the Dean of the College of Letters & Science who either forwards a favorable recommendation to the Chancellor

or informs the candidate of non-renewal of contract.

24. In May of 1975, when Namenwirth's contract was extended an additional year, she asked that the Salary and Promotion Committee not consider her for tenure that year (her fourth).

25. On October 13, 1975, Namenwirth was asked to submit materials or documentation for the Salary and Promotion Committee to use in the review of her activities for deciding whether she should be promoted to the Associated Professor rank with tenure. She submitted a bibliography of current publications and manuscripts in preparation and a narrative description of research projects in progress.

26. In January of 1976, the Salary and Promotion Committee extended Namenwirth's contract for an additional year and stated that:

Dr. Namenwirth was seriously considered for promotion this year by our Salary and Promotions Committee. We have sufficient information, which was, overall favorable, to evaluate her teaching and service activities, but insufficient data to make an evaluation of her research contributions. New manuscripts listed have only recently been completed and are not yet ready to be evaluated by editorial reviewers or various scientists in the field outside the University. When these reports are available, the Committee will re-examine her qualifications for promotion to tenure and submit its recommendation to the Executive Committee. In the meantime, we feel that a one-year extension of her appointment is entirely appropriate. We recognize that 1976-77 represents her sixth year as an assistant professor and the final decision regarding promotion or non-renewal will need to be made before the end of that year.

27. During the winter of 1976, the Salary & Promotion Committee began its review of Namenwirth's record for possible promotion to tenure. At that time, she was the first woman to have been considered for tenure in thirty-five (35) years by the Zoology Department.

28. There was a concern at that time among the Salary and Promotion Committee members that the number of Namenwirth's publications might be insufficient for her to achieve tenure. Namenwirth was aware of this concern. The Committee's concern was over the number of publications, not their quality.

29. The Salary & Promotion Committee had solicited and received outside review letters on Namenwirth from eight developmental biologists outside the University of Wisconsin-Madison. Some of the outside reviewer names were suggested by Namenwirth, others by Sonneborn. When

it appeared as though Namenwirth's tenure consideration would encounter difficulty, Auerbach suggested to Namenwirth that two additional reviewers be selected: Dr. Briggs, Namenwirth's former major professor, and Dr. Hay, a scientist whose high standards of judgment he greatly appreciated.

30. The Salary and Promotion Committee favored Namenwirth's tenure recommendation, but only by a slight majority. The committee did not recommend tenure. It made no recommendation. Instead, it prepared a report that was of considerable importance in Namenwirth's future tenure considerations. Because the report was considered by department chairman Burns to reasonably represent the range of matters debated by the department in the tenure process, it ultimately became a part of the department's submission to the Divisional Committee. Among other negative and

positive evaluations within it, the report expressed serious concern as to the adequacy of Namenwirth's publication record and the strength of her research program. These concerns were not unreasonable.

31. Following the deliberations of the Salary and Promotion Committee, the Namenwirth tenure case was presented to the tenured faculty of the Zoology Department for its discussion and vote.

32. The Salary and Promotion Committee report was presented to the faculty at a February 1, 1977 meeting, with no recommendation as to tenure. Professor Auerbach presented the report for the Committee. At that meeting, a vote was taken and a recommendation for tenure was defeated on a vote of 10 yes, 11 no, and 1 abstention. This split vote was the result of apparently independent determination by the participating faculty members.

33. Professors Dodson and Moermond had the benefit of an "advocate" during the course of their tenure considerations in 1970 and 1978-79, repectively; i.e., a tenured faculty member who, without any formal appointment or designation, was outspoken in his effort to advance the candidate's tenure chances. No such "advocate" emerged for Namenwirth in the course of her tenure consideration.

34. This does not mean, however, that Namenwirth had no supporters. The close vote on February 1 demonstrates the contrary. Among those voting for Namenwirth were the department's three other developmental biologists, professors Sonneborn, Auerbach and Lilien.

35. A request for reconsideration of the initial Namenwirth tenure vote having been made, the matter was considered again at a faculty meeting on February 8, 1977. Namenwirth spoke on her own behalf at the

meeting. A vote was taken and a reconsideration for tenure was approved on a vote of 12 yes, 10 no, and 1 abstention.

36. At Auerbach's request for reconsideration, a third vote on tenure was taken at a February 22, 1977 faculty meeting. The recommendation for tenure was defeated by a vote of 9 yes, 13 no, and 1 abstention.

37. Namenwirth requested reconsideration of the third vote. At a March 15, 1977 faculty meeting, a fourth vote was taken. Auerbach was not present. He was telephoned by Professor Burns and abstained. The vote was 10-10 with three abstentions. When contacted again, Burns changed his abstention to a positive vote and a recommendation for tenure for Namenwirth was approved by a vote of 11 yes, 10 no and 2 abstentions. This was the final department vote on the matter.

38. Prior to the final vote at the March 15 meeting, a letter from Zoology Professor

Neess was distributed to the faculty at the meeting. In his letter, Neess expressed the opinion that in seeking the view of so many outside reviewers, the tenured faculty was holding Namenwirth to a more severe tenure test than had been applied to previous male tenure candidates.

39. Prior to the 1971 hiring of Namenwirth to a tenure track position, the only other women to hold a tenure-track position in the UW-Madison Zoology Department was Dr. Nellie Bilstad. She received her Ph.D. at the UW-Madison and was first hired into a tenure track instructor position in 1931. She was granted tenure as an Assistant Professor in 1942, and was promoted to Associate Professor rank in 1950. There she remained until 1969, her final year before retirement, when she was at last promoted to full professor.

40. During her faculty career at the UW-Madison, Bilstad received a salary lower

than her male counterparts and appears to have been treated by them in a patronizing and condescending manner. Although her research activities were modest, male department colleagues who were junior to her and who also did little research rose rapidly beyond her in both salary and rank. With regard to her salary level and promotional advancement, it very clearly appears that Bilstad was the victim of purposeful discrimination on the basis of her sex.

41. The discrimination against Dr. Bilstad reflected longstanding and pervasive sex discrimination in higher education at the UW-Madison and elsewhere throughout the nation, prior to March 24, 1972, when Title VII became effective as to institutions of higher education.

42. In 1970, only 150 of 2,000 faculty members at UW-Madison were female. Half of the women faculty were in traditionally female departments: nursing, home economics

and women's physical education. Moreover, the tendency was for such women to be concentrated in the lower academic ranks of instructor and research associate.

43. In 1970, over 50 departments at UW-Madison had no women faculty members at all; yet in the academic disciplines represented by these departments, from 10% to 38% of the Ph.D.'s were being awarded to women.

44. In July, 1970, the Department of Health, Education and Welfare, responding to a complaint from the Women's Equity Action League, began investigating alleged sex discrimination at the Univeristy of Wisconsin. HEW concluded that there was a pattern of discrimination against, and under-utilization of, women at UW-Madison.

45. Responding to pressure from HEW, UW-Madison Chancellor Edwin Young directed university departments to initiate a program of remedial hiring for women faculty. An "Affirmative Action Office" was also set up

under the Chancellor's supervision. Its responsibilities were to monitor hiring and promotion statistics at the UW-Madison, as well as to investigate complaints of discrimination.

46. Investigations by H.E.W. and by the University itself revealed unjustifiable salary discrepancies between male and female faculty at the same rank and in the same department, ranging as high as $5,000.00. A total of 424 salary equity adjustments were then made in the early '70's. The so-called "Women's Issues" and "Affirmative Action" became important topics of discussion and activity on the UW campus in the early 1970 s. Professor Arbrahamson of the Zoology Department served as a member of a committee that acted to equalize salary instructions at the UW-Madison.

47. As late as 1978, of 323 tenured faculty in the science departments of the

College of Letters and Science, only 6 were women.

48. Even today, only 19 of 113 UW-Madison departments have women represented on their faculties in proportion to their percentage availability in the profession. Twenty-seven departments still have hired no women.

49. Because of the inherent subjective component of tenure evaluations, and because of the predominence of males in tenured faculty ranks, and because of the prior history of active sex discrimination in higher education, and because of the present continuing under-representation of women in tenured faculty ranks, there is a real but unquantifiable danger that sex bias will enter into any tenure consideration process.

50. Following the final March 15, 1977 vote of the zoology faculty to recommend tenure for Namenwirth, department chairman Burns prepared a tenure submission (or

packet or dossier) which was forwarded to the Executive Committee of the Biological Sciences Division. The tenure packet included evaluations of Namenwirth's performance in the three critical areas of teaching, research and service. Although she was rated well in teaching and service, the research evaluation stated that "her research accomplishments and potential" were a "major source of concern." In expressing the two divergent schools of thought within the department on her research -- (one) that while her published work was sound, her publication record was inadequate and her potential for future high-quality research was questionable, and (2) that her publication record was acceptable and that her potential for future work ought be rated excellent on the basis of the excellent quality of her already completed work -- the packet fairly characterized the ambivalence of the Zoology Department's

tenured faculty on her tenure recommendation. The packet also openly conceded that no other tenure candidate "in recent years has had his credentials and activities so thoroughly examined as Dr. Namenwirth."

51. The packet sent to the Divisional Committee from the Zoology Department in March of 1977 was assembled through a process in which Namenwirth had a full and fair opportunity -- and a genuine personal incentive -- to participate, contribute, and comment. Indeed, the packet included material provided by and written by Namenwirth, including a statement on planned improvements in her teaching duties and an outline of her current research ideas and accomplishments. Namenwirth had considerable opportunity to correct any errors, omissions, or misinterpretations that she believed to be contained in the packet.

52. The Namenwirth tenure packet also included a frank description of the intense departmental debate over Namenwirth's tenure, the repeated voting, and the close nature of the tenure recommendation vote. Anything less would have been disingenous.

53. Namenwirth's case came up for discussion briefly near the end of the April 1, 1977 meeting of the Biology Division Executive Committee, but was held over to the next meeting. As Professor Norma Kolthoff left the meeting as part of a group of Divisional Committee members who were walking in a group to the west part of the campus, she overheard another but unidentified committee member remark: "But Nellie was such a lady." She knew that Nellie Bilstad had been the only women ever to hold a tenured faculty appointment in Zoology. The context of this remark is unclear. There was never any comparison of Bilstad with Namenwirth during the course

of the Divisional Committee proceedings in Namenwirth's case. I can attach no significance and can ascribe no meaning to this isolated comment.

54. On April 22, 1977 the Divisional Committee considered Namenwirth's tenure and voted to recommend rejection of the Zoology Department's recommendation for tenure by a vote of 10 to 2. Zoology Department Chairman Burne was informally notified of the committee's vote within a very few days but was unable to obtain an official written decision until May 27, 1977. On that date he received a copy of the committee's letter to Dean Cronon, dated May 26, 1977, and he forwarded it immediately to Namenwirth. The committee's letter, written by Chairperson Dorothy J. Pringle, contained the following explanation for its disapproval of Namenwirth's promotion to a tenured rank:

> [T]he positive vote of the Executive Committee of the Department of Zoology by the narrowest of margins seems to indicate that the Department is not sure that this is the best candidate for the position.
>
> In revising the record, the Executive Committee felt that Professor Namenwirth's teaching and service performance were satisfactory. The research record, however, seems to represent a last minute effort to get sufficient evidence for tenure rather than represent an independent effort to develop a research program that is original and of high quality and significance. Professor Namenwirth's satisfactory teaching and service performance does not outweigh the weak research performance.

55. In advising Namenwirth on May 27, 1977 of the Divisional Committee's final decision, Burns also advised that he had been informed by Dean Cronon that the dean

was accepting the committee's decision and would not recommend Namenwirth's promotion and tenure.

56. In a May 31, 1977 letter to Dean Cronon, Namenwirth requested a reconsideration of the decision to deny tenure. She also complained to the Department that the Divisional Committee's reasons for disapproving tenure contained false statements about her work.

57. There followed from May 31, 1977 until April 7, 1978, correspondence and meetings between the Dean, Namenwirth, the Department and Divisional Committee regarding several matters, including the possibility of the Divisional Committee either clarifying the reasons for the previous Divisional Committee's decision as set forth in the letter of May 26, 1977, or reconsidering Namenwirth's case for the purpose of attempting to make a new decision.

58. The department discussed the matter at several meetings and protested formally to the Division by letter on October 12, 1977. The department did not believe that reconsideration of tenure was appropriate; instead, its objection was to be reasons set forth in the Pringle letter. The department was satisfied with the outcome of the tenure decision; it simply wanted a better statement of reasons.

59. The Divisional Committee wanted to reconsider the Namenwirth case, but then insisted they would do this only after the Department had reconsidered the case itself, taken another vote, and forwarded an updated set of written materials. The Zoology Department refused to do this. They urged the Divisional Committee to produce, instead, an acceptable set of reasons for the original decision to recommend against tenure. The Divisional Committee was unwilling to do this.

60. Namenwirth was notified in early April of 1978 that there would be no reconsideration of her tenure denial.

61. Namenwirth appealed to the University Committee in the summer of 1978. The University Committee recommended that the Divisional Committee reconsider the Namenwirth case, using only the documents originally submitted by the Zoology Department. They recommended also that Namenwirth be retained on the faculty one more year, and that the Divisional Committee consider, in addition to the department's written materials, additional material that Namenwirth was invited to submit.

62. The Namenwirth case was accordingly reconsidered by the Biological Division Executive Committee on October 20, 1978. Her case was assigned to committee members Dr. Richard Hanson, as the primary presentor, and Dr. Norma Kolthoff, as the secondary presentor.

63. The Department of Zoology duplicated a new set of copies of their original submission and distributed this to the Divisional Committee. However, they added to the submission an Appendix VII, containing several letter written by Namenwirth shortly after she had been denied tenure, and had seen for the first time the written materials the department had submitted describing her work. In these letters Dr. Namenwirth raised the issue of possible sex bias.

64. Dr. Hanson made as careful a presentation as possible about Namenwirth's record, relying on the Department's submission, but attempting to exclude those parts of the submission which he considered unfair, and relying as well on the extensive materials submitted by Namenwirth.

65. In the course of his presentation to the committee, Hanson reported that Namenwirth had three grant applications

turned down. They were a 1972 applicat .. to the National Institute of Health, a 1974 application ot the Muscular Dystrophy Foundation. and a 1975 application to the National Institute of Health. This information was somewhat misleading. The 1972 application had already been funded by the National Science Foundation. The 1974 application to the Muscular Dystrophy Foundation was in fact rejected. The grant proposal listed as being turned down by the National Institute of Health in 1975, was in fact, never submitted to that agency. Dealing with research on regional localization of macromolecules, it was partially written by Namenwirth, then withheld pending her publication of an article on her original regional localization research. Auerbach had advised Namenwirth, and she agreed, that a second grant proposal would not have a reasonable chance of being funded unless the research

done on the previous grant had been published.

66. Dr. Hanson properly considered the presence of grant support to be essential to a scientist's future research, and the absence of grant support to be a serious impediment to such future research. The information Hanson had received about Namenwirth's grant support left him with the impression that she did not have funding to continue her present research. Although that information was somewhat misleading, it was the case that Namenwirth had no significant grant support for her continuing research from agencies outside the University.

67. Dr. Hanson made a lengthy, complete and positive presentation to the Divisional Committee on October 20, 1978. Thereafter, the committee voted. The vote was 7 to 2 against granting tenure to Namenwirth. Dr. Hanson voted with the majority, but

personally considered Namenwirth's record to be a close call.

68. The committee's decision was reported to Namenwirth in a letter dated October 24, 1978. The letter stated:

> The Executive Committee of the Faculty Division of the Biological Sciences met on Friday, October 20, 1978, to consider, among other business, a directive from the University Committee to review the Zoology Department's request for your promotion to associate professor with tenure. The same packet of material sent to the Executive Committee in 1977, along with additional documents prepared by you, were the basis of the evaluation. The review procedure was identical with that used for all candidates in 1977. A very thorough assessment was made and all aspects of the record were discussed. As required by our rules, Dr. William Burns, former chairman of the Zoology Department and presently a member of the Committee, did not

participate or vote, he was, however, available for questioning by the Committee.

This Committee is responsible for peer evaluation and its deliberations are not taken lightly. We seek for the welfare of this university outstanding faculty in a family of academic disciplines. Our criteria for promotion to tenure rank require that a candidate must demonstrate excellence in teaching or research, and show satisfactory performance in the second area and in service. Your record had some laudatory aspects, but the Committee did not regard any area as demonstrating excellence. The motion to recommend promotion to tenure failed to pass by a vote of 2 yes, 7 no, 1 technical abstention. (Two members of the Committee were absent.) Promotion is therefore not recommend.

69. Dean Cronon accepted the Divisional Committee decision and once again decided not to recommend her tenure. In

February of 1979, at Namenwirth's request, he provided her the following reasons for his decision:

(1) The narrow majority of the Zoology Executive Committee recommending you for tenure after initially voting against tenure by an equally narrow majority.

I have serious doubts about the wisdom of granting tenure unless a substantial majority of the executive committee recommends it. Unlike the Zoology Department, a number of our departments require a two-thirds majority to recommend tenure, a provision I favor and recommend to all L & S departments.

(2) The negative reviews by the Biological Sciences Divisional Committee, which twice recommended against your tenure by a large margin.

As you know, the four Divisional Committees are the general faculty's major quality control mechanism for faculty appointments to tenure. Each Committee operates across the entire

University in its specialized area. A Dean must consult the appropriate Divisional Committee on the qualifications of all candidates for tenure. Because the Divisional Committee reflects the opinions of scholars outside the Department but from fields closely related to it, and because it is a disinterested body concerned with the overall quality of the faculty of the University, a Dean must consider its advice on tenure cases very seriously.

(3) My concern about the serious current budgetary problems of the College and the likelihood of further budgetary difficulties if our enrollment should level or decline in the next few years, as seems quite possible.

We presently face the need to reduce our staffing in some areas of the College. Under the circumstances, I believe it is especially important that we grant tenure only to those faculty members whose

> qualifications are beyond question and whose sevice is likely to be needed regardless of any enrollment fluctuations we can foresee at this time.

70. Later in that academic year, the same Divisional Committee received a unanimous recommendation for tenure from the Zoology Department on behal. of Dr. Timothy Moermond, an ecologist.

71. The Divisional Committee, on the basis of Moermond's record which they found to be weak, voted to deny him tenure. Three Zoology faculty members appeared before the committee, however, to protest the tenure denial, to present additional positive evidence on Moermond's case, and to argue his merits.

72. The Zoology Department had the opportunity to similarly contest the Divisional Committee's tenure denial of Namenwirth in May of 1977, but chose not to do so. The department had no additional

material to present in support of Namenwirth's tenure consideration.

73. Appearances by faculty members before the Divisional Committee that merely involved the rearguing of information already supplied about a rejected colleague were not likely to have any effect upon the committee. Effective presentations were those that urged the committee's consideration of new relevant information.

74. The presentation of the three Zoology Department professors in Moermond's case -- a presentation that included information that a previously submitted grant had been funded -- swayed enough votes to result in a Divisional Committee decision to recommend tenure for Moermond.

75. Moermond was shortly thereafter promoted to a tenured rank in the Zoology Department.

76. On July 25, 1979, Professor Namenwirth filed a complaint with the

Milwaukee office of the Federal Contract Compliance Division of the United States Department of Labor, alleging sex discrimination by the UW-Madison.

77. After conducting its investigation, the Department of Labor concluded on October 7, 1980 that the denial of tenure for Namenwirth was the result of a weak tenure recommendation from the Zoology Department, and that she was given a weak recommendation because of her sex.

78. The tenured faculty members of the Zoology Department concluded -- albeit by a narrow margin after considerable debate and equivocation -- that Namenwirth was qualified for tenure. This conclusion was reasonable. Thus, Namenwirth, a female, was reasonably qualified for a tenured position in the UW-Madison Zoology Department. Namenwirth was subsequently denied tenure by the action of the Biological Sciences Divisional Committee and Dean David Cronon.

79. A male, Timothy Moermond, was thereafter promoted to the tenured rank Namenwirth had sought.

80. The defendant Board articulated by evidence at trial the reason for: (a) the Zoology Department's ambivalent and narrow recommendation of tenure for Namenwirth; (b) the Divisional Committee s rejections of the tenure recommendation; and (c) Dean Cronon's decision to deny tenure to Namenwirth. The articulated reason is a reason unrelated to the fact that Namenwirth is a woman. That reason is that, particularly in the area of research output and potential, Namenwirth failed to meet the standard for promotion to tenure at the UW-Madison.

81. In the course of Namenwirth's tenure consideration, a sizable minority of the Zoology Department tenured faculty in fact decided that Namenwirth did not meet the standard for tenure at the UW Madison, principally because of the deficiencies they

perceived in her research output and potential. This was a reasonable decision, and the articulated reason for the decision is not a pretext. If all other factors had been the same, but Namenwirth had been a man and not a woman, the decision of the sizable minority of the Zoology Department would have been the same: to oppose Namenwirth's tenure.

82. In April of 1977 and again in October of 1978, the Divisional Committee in fact decided that Namenwirth did not meet the standard for tenure at the UW-Madison, particularly in the area of research. This was a reasonable decision, and the articulated reason for the decision was not a pretext. If all other factors had been the same, but Namenwirth had been a man and not a woman, the decision of the Divisional Committee would have been the same: to reject Namenwirth's tenure.

83. In May of 1977 and again in February of 1979, Dean David Cronon in fact decided that Namenwirth did not meet the standard for tenure at UW-Madison, particularly in the area of research. This was a reasonable decision, and the articulated reason for it as not a pretext. If all other factors had been the same, and if Namenwirth had been a man and not a woman, the decision of Dean Cronon would habe been the same: to deny tenure to Namenwirth.

CONCLUSIONS OF LAW

The conclusions that follow constitute my conclusion of law, made pursuant to Rule 52(a), FED.R.CIV.P., on the basis of the facts that I have found above.

1. All jurisdictional requirements for commencement and maintenance of this action were properly and timely met.

2. Defendant Board is an employer as defined in 42 U.S.C. §2000e(b), as amended.

3. Plaintiff Namenwirth tried and argued this case on a theory of disparate treatment; i.e., her claim was that she was treated less favorably in the academic promotion process than others because of her sex. Thus the legal burdens in this case were as follows:

-- plaintiff had the burden of proving a prima facie case of illegal discrimination by a preponderance of the evidence;

-- upon demonstration of a prima facie case, the burden of production shifted to defendant Board to articulate a legitimate, non-discriminatory reason for the denial of tenure to plaintiff;

-- upon articulation of such a reason, the plaintiff, in order to successfully discharge her ultimate burden of persuasion on the issue of discrimination, must prove by a preponderance of the evidence that the defendant's articulated reason was a mere pretext

making a genuine discriminatory motive.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas v. Green, 411 U.S. 792 (1973); Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979).

4. In order to establish a prima facie case of discrimination, Namenwirth was required to demonstrate that: 1) she is a member of a Title VII protected class; 2) she was qualified for the tenured position she sought; 3) she was denied promotion to the tenured position; and 4) a male of similar qualifications was granted promotion to this position. Smith v. University of North Carolina, 632 F.2d 316 (4th Cir.) 1980). Namenwirth successfully discharged her burden of proving each of these elements. The first, third and fourth elements were not disputed and were obviously proven. The second element, her

qualification for a tenured position in the UW-Madison Zoology Department was amply demonstrated by convincing evidence that she had the basic skills necessary for the job. That much at least was established by her reappointment after her first, third, fourth and fifth years of teaching and by the departmental faculty's ultimate majority vote in favor of her tenure. Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974); Davis v. Weidner, supra.

5. The burden of production having shifted to defendant Board, the Board clearly articulated a legitimate, non-discriminatory reason for the denial of Namenwirth's tenure; i.e., that while she was qualified for tenure in the sense that she possessed the minimum qualifications for the job, her research record and research potential were insufficient to satisfy the excellence standard required at UW-Madison for promotion to the tenured ranks.

6. To successfully discharge her ultimate burden of proof on her discrimination claim, the burden returned to Namenwirth, to prove that the Board's articulated reason for the denial of tenure was pretextual. Namenwirth attempted to discharge this burden by introducing evidence of: her differential treatment; her being held to higher standard than her colleagues; procedural deficiencies in her tenure process; a lack of counseling regarding tenure from her male faculty colleagues; a general discriminatory atmosphere at the UW-Madison and within the Zoology Department; a lack of safeguards against sex-bias in the tenure process; past sex-discriminatory practices; and evidence of sexist attitudes possessed by her faculty evaluators. As my findings of fact reflect, I conclude that Namenwirth failed to prove the Board's reason for denying her tenure was pretextual, and that she thus failed to

discharge her ultimate burden of persuasion. I am simply not persuaded that Namenwirth's preferred evidence -- much of which was too insubstantial to support the intended finding -- showed that the tenure decision-makers in her case acted with the purpose of disciminating agaisnt her on the basis of sex.

Instead, I am persuaded that defendant Board's articulated reason for denying tenure was the true and genuine basis for the challenged denial of tenure: a reasonable decision, with which others equipped to render the decision might differ but which I cannot reject as arbitrary, that Namenwirth did not possess the requisite research credentials to satisfy the tenure standard. The subjective nature of that decision-making process required that I examine defendant's evidence with the strictest scrutiny, particularly where the challenged tenure denial occurred in the

case of the only woman to be considered for tenure in 35 years in the UW-Madison Zoology Department. Having conducted that scrutiny, I am persuaded that the denial of tenure in this case was genuinely based upon a commitment to scientific excellence and not upon adherence to illegal sex-based animus.

7. Having concluded that the denial of tenure to plaintiff Namenwirth was not based upon her sex, I further and finally concluded that such denial of tenure did not deprive her of any rights secured by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et. seq.

ORDER

IT IS ORDERED that the judgment be entered in favor of the defendant and against the plaintiff, **DISMISSING** her complaint with prejudice.

Entered this 27th day of October, 1983.

/s/
William L. Gansner
United States
Magistrate

(4)

85-909

No.

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARION NAMENWIRTH,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

This matter arose out of a tenure denial at the University of Wisconsin-Madison. Petitioner, Marion Namenwirth, was a female probationary faculty member in the Zoology Department at the University who was denied tenure. She

filed a suit under Title VII alleging that her failure to achieve tenure was on account of her sex. After a lengthy trial and testimony before a magistrate, consented to by the parties, the district court issued findings of fact, conclusions of law, and a decision in favor of the university.

The district court's findings included findings on comparative testimony involving male faculty, and findings on matters alleged by Namenwirth to have been instances of disparate treatment, as well as the findings that the articulated reasons were not pretextual. The circuit court held that the district court's findings were sufficient and were not clearly erroneous.

REASONS FOR DENYING THE WRIT

I. The Use Of Subjective Criteria Judgments In Tenure Determinations Does Not Offend Title VII.

The petitioner asserts that this court should grant certiorari to review the deference allowed in federal decisions to the opinions of university faculty when they are making tenure judgments which involve the evaluations of the research and performance of probationary faculty. Presumably the petitioner would have this court reject such deference.

Federal circuits that have considered the role of tenure in the context of Title VII have accepted the uniqueness of the tenure decision and such courts have been attentive to the factors that make the tenure determination unique. Zahorik v. Cornell University, 729 F.2d 85 (2nd Cir. 1984);

Lieberman v. Gant, 630 F.2d 60 (2nd Cir. 1980).

Justice Powell in his concurring opinion in Hishon v. King & Spalding, 81 L.Ed.2d 59, 70 n. 4 (1984) noted:

> [T]he courts of appeals generally have acknowledged that respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions.

Unlike most employment determinations the decision on tenure, particularly at a ranking university such as the University of Wisconsin-Madison, is an absolute judgment made in the context of the individual's particular and often unique record of scholarship and in the context of the often unique attributes that an individual can bring to the academic setting. The tenure

decision is virtually a lifetime appointment.

At a major research institution such as the University of Wisconsin-Madison, the evaluation of the qualifications of a tenure candidate will necessarily involve substantial subjective elements. Contrary to the comment by the dissenting judge, the tenure determination is different than other employment determinations and that difference has been recognized in settled federal decisional law on the application of Title VII.

The tenure determination, particularly the searching inquiry by the Divisional Committee, was an effort to select, not the adequate, but the finest from among the best. The University of Wisconsin-Madison, and in particular the Divisional Committee, was not interested in tenuring an adequate researcher, but

rather interested in tenuring a researcher who met the standard demanded by a department considered one of the top departments in the nation.

In recognizing the difficulties inherent in a tenure determination, and further recognizing the inherent difficulty faced by a court when the discrimination claim involves assertions against faculty judgment of research potential and/or research achievement in specialized areas, the circuit was simply recognizing the deference accorded and the difficulty in second-guessing the judgment of a faculty committee comprised of experts. In the tenure evaluation the Departmental and Divisional Committees act in part as judges and in part as experts. They are asked to apply not only their own acknowledged expertise, but to apply it to a necessarily

subjective concept of future research potential over the future career of the candidate. Where a group of faculty experts makes an evaluation in an area in which there can be disagreement, the judgments of those faculty are entitled to deference unless those judgments are beyond the area of reasonableness. Faculty members such as Professor Abrahamson, Professor Borisey, Professor Ris, Professor Auerbach were all recognized experts in the field.

In the traditional employment event there is a choice made between similarily experienced and/or qualified individuals in a relatively close time frame. In this instance the focus of the comparison, and certainly the thrust of the dissenting judge's points, were directed at the tenure determination made in the case of Professor Timothy Moermond.

Moermond was an ecologist, a specialist in ornithology whose work, research, and research anticipation were dissimilar to Marion Namenwirth's. They were considered at different times and upon records based upon different times. Because of the appeals taken, Namenwirth's rejection did not occur at the Divisional Committee level until 1979, but that decision was on a record completed in 1977. It would be astounding under the circumstances if a group of more than twenty faculty did not evidence some differences in their approaches to the tenure issues between the two candidates at different times.

One clear difference between Timothy Moermond and Marion Namenwirth was in outside research support at the time of the tenure determination. Marion Namenwirth did not have outside grant

support for continuing research as of the time for tenure; Timothy Moermond received an award of a research grant during the tenure process which swayed enough votes on the Divisional Committee for his tenure. The district court made specific findings that the presence of grant support was considered essential to a scientist's future research [the test for tenure was research potential]; that Marion Namenwirth had no significant grant support for her research from outside the University; that Moermond received information of the funding of a grant from an outside source; and that this information conveyed to the Divisional Committee swayed enough votes for this tenure grant.

There was and is no basis for the assertion by the dissenting judge that "only sex" explains the different results

in tenure between Marion Namenwirth and Timothy Moermond. The entire process, including the effort by the court to compare different specialities, considered at different times, on obviously and necessarily subjective criteria, demonstrates the legitimacy of the deference afforded to tenure determinations.

Interestingly, there is no suggestion that Marion Namenwirth should have been considered in a comparison with a male faculty member in the same department who was considered and tenured in the same year as Marion Namenwirth. That individual, Professor Kitchell, had a total of nineteen (19) publications as of his third year of probation and large amounts of outside grant support. It is in the closer calls that the subjective elements play a more crucial role. In an

area as crucial to the university as tenure, such second-guessing is inappropriate and the deference afforded proper.

II. The District Court Made Appropriate Findings Concerning Pretext.

The petitioner takes issue with the acceptance by the circuit court of the district court's findings of fact and conclusions of law. Petitioner focuses on language in some of the findings that the decisions of the University committees and the Dean were "reasonable."

In Anderson v. Bessemer City, 84 L.Ed.2d 518 (1985), this Court set forth the test to be applied by a circuit court reviewing the findings of a district court. In Anderson, a Title VII case, this court reaffirmed the role of the district court as the determiner of the essential factual matters in an action.

In this case as in Anderson, the district court did not "uncritically" accept the findings proposed by the parties, but rather issued its own findings after careful consideration of the submissions from both parties and after having heard extensive testimony. The majority of the circuit fulfilled its proper role under Anderson by accepting and upholding the findings made by the district court.

The specific findings by the district court included findings:

a) That she had a full and fair opportunity to present any materials in favor of her tenure to the committees and to correct any errors or omissions in the record forwarded by the Department to the Divisional Committee;

b) That grant support was essential to a scientist's future research, and the absence an impediment;

c) That Namenwirth did not have significant grant support for continuing research from outside the university; and that the grant for Moermond resulted in his tenure;

d) That the university articulated a reason for the denial of tenure that was not related to sex;

e) That the determination by a sizeable minority of the department was not a pretext;

h) That had Namenwirth been a man in the same circumstances the decision of the sizeable minority of the Divisional Committee would have been the same, to deny tenure;

i) That the decisions by the Divisional Committees that Namenwirth did not meet the standards for tenure was not a pretext, and had she been a man in the same circumstances the decision of the

Divisional Committee would have been the same, to deny tenure;

k) That had Namenwirth been a man in the same circumstances the decision of the Dean denying tenure would have been the same, to deny tenure, and that the decision was not a pretext;

The district court also, in the discussion immediately following the findings, enumerated contentions made by Namenwirth of allegedly differential treatment, and concluded that the proffered evidence did not show that the tenure decision makers acted with the purpose of discriminating against her on the basis of sex. The district court's discussion continued that the articulated reason was the "true and genuine" basis for the tenure denial, and that the denial of tenure was "genuinely based upon a commitment to scientific

excellence and not upon adherence to illegal sex-based animus."

The circuit court majority addressed itself properly to a review of the district court's findings under the standards articulated in Anderson, and concluded that the findings were not clearly erroneous.

Any fair reading of the district court's findings shows the district court did apply the proper standard-articulated reason, not pretextual. It was not inappropriate, in the context of the tenure determination, for the district court to have considered whether or not the decisions of the various committees and the dean were "reasonable" and/or "non-arbitrary." At worst those additional findings beyond non-pretext were inoffensive additions. More particularly, those findings reflected

the uniqueness of the tenure process. A university, including this university, does not decide tenure in a monolithic manner. Rather the often argumentative and contentious groups of scholars consider a "record" and make a determination, a judgment, applying standards that necessarily contain broad and subjective elements. For the tenure process to function, some latitude must be given for the room in which reasonable faculty could disagree. The district court recognized this attribute in its finding that "reasonable persons engaged conscientiously in an effort to apply the standard to a particular candidate ... could reasonably differ in their conclusions." Directly reflecting the problem posed in the department's examination of Namenwirth's record in 1977, as a laboratory biologist, with

Timothy Moermond's record in 1979, as an ecologist, the district court further found that "any one person conscientiously engaged in an effort to apply the standard to different tenure candidates over a period of time could reasonably apply the standard somewhat unevenly among the candidates." The district court also found that there are differences between the specialty fields of Namenwirth and Timothy Moermond, and that ecologists are generally field researchers.

It is in the context of the deference accorded to academic tenure determinations that the district court applied a reasonableness test. In effect other courts have done likewise in determining that deference is due to the reasonably made determinations of academic faculty.

In addition to suggesting a substitution of his own views of the record for the district court's views, the dissenting judge implicitly would have rejected the district court finding that the standard for tenure could be properly applied differently by faculty to different candidates over different times, and that there were differences in the disciplines, which could cause some difference in the approach taken by such faculty decision makers.

III. The District Court Applied The Proper Test.

The petitioner contends, assertedly relying on language in the separate opinion of Justices Blackmun and Brennan in U.S. Postal Service Bd. of Govs. v. Aikins, 460 U.S. 711 (1983), that even if the university articulated a non-discriminatory reason that was determined

to be non-pretextual, the district court should have accepted other indirect proof based upon alleged differences in Namenwirth's experiences and the experiences of some other, male, faculty. Petitioner appears to take the language from the separate opinion out of context. The separate opinion concludes: "[T]he McDonnell Douglas framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." At page 718. The necessary converse is that the defendant prevail when the legitimate, nondiscriminatory reason given by the employer is in fact the true reason for the employment decision. Even assuming petitioner's

argument has any merit under Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the district court did in fact deal with those alleged differences. The district court's findings addressed most of the assertions:

a) To the group of assertions of differences in the manner in which the process was conducted for Namenwirth, the district court held that the report from the department was proper, "anything less [than the frank report] would have been disingenuous"; and found that Namenwirth had a full and fair opportunity to be heard.

As the detailed findings indicate, the distinctions in the processes were the result of proper differences that reflected the careful attention given by

the committees to Namenwirth's tenure, and the numerous appeals that Namenwirth pursued.

b) To the collection of contentions made by Namenwirth that she was not accepted socially in the department, the district court found that the interactions between the faculty members were generally informal and conditioned by physical proximity, or common laboratories, and that although her opportunities for such informal interactions were reduced by her office and lab locations, her relations with her colleagues were cordial. The district court also found that the members of the department were housed in disparate geographic locations on the campus, and that for many members of the department the weekly faculty meetings were their only contact.

c) Concerning various assertions about the number and identity of outside reviewers, the district court found that some of the names had been suggested by Namenwirth, and that when it appeared that her tenure might encounter difficulty, Professor Auerbach suggested that two additional reviewers be selected, one of whom was Namenwirth's former major professor.

d) With respect to the assertions of pre-act salary disparity, the district court found that in the early 70's the University of Wisconsin-Madison responded by establishing an affirmative action program and making some 424 salary adjustments.

There was no statistical evidence presented by Namenwirth that would have shown any significance in the assertion that Namenwirth was the only female on

tenure track in 35 years in the department. In fact there were few appointments in total during that period, the appointments were in different specialities and there was no showing of any statistical disparity in the appointment of any of the faculty during the 35-year period.

The significance of the finding concerning discrimination in salary to a single female faculty member between 1937 and 1969, when she retired as a full professor, is not shown statistically. The district court simply found that this was an example of the pre-act policy at various universities. Prior to at least 1972, this was not discrimination under Title VII, and in any event, as the district court further found, was addressed and remedied by the university in the early 1970's. The district

court's finding on this point identified Professor Abrahamson, a department member opposed to Namenwirth's tenure, and presumably one of the inherently discriminatory males, as a participant in the salary adjustment efforts.

f) Petitioner attempted to show that some form of sexual bias was present among the member of at least one of the Divisional Committees, by offering testimony of a statement heard, out of context, from some unidentified person to the effect "but Nellie was such a lady." The district court considered this evidence specifically and concluded no significance could be attributed to the remark.

g) The district court made findings on the assertion that Namenwirth did not have an "advocate" as some of the male faculty members had. An "advocate"

in this context was simply a faculty member who, without any formal appointment or designation, was outspoken in support of a particular candidate. The district court did find that Namenwirth had supporters, including the other members of the developmental biology faculty who voted for her tenure. Namenwirth also spoke in her own behalf. The district court found that although the standards for awarding tenure had remained the same, the application had become more exacting beginning in the early 70's due to a lessening of available funds and positions.

i) The district court did not make any findings on the line of testimony presented by Namenwirth, and objected to by the university, that the male members of the department, and the male members

of the Divisional Committees, were inherently incapable of fairly judging Namenwirth because of their sex, and due to their conditioning prior to attaining the age of four. This contention, which might be characterized as "stereotypical sexism" was presented through a female sociologist who asserted, without any specific knowledge of any particular faculty member, that males in general are incapable of making fair judgments concerning females. [Tr. 10-8; 10-39; 10-58.] This same witness asserted that comments about Namenwirth's style of dress and weight, negative but true, attributed to male faculty member Lilien were evidence of sexist intent, because Namenwirth was female, but that the same type of comments made by Lilien about male colleagues were not evidence of sexual intent or evidence of evenhanded

treatment because only males who are performers or gay are concerned about their weight or dress. [Tr. 10-114.] The witness testified that she derived this conclusion from a dictionary of some thirty-six thousand (36,000) terms that presumably a male could not use without being accused of having a sexually biased intent. [Tr. 10-111.]

The district court had the discretion to ignore this "expert" opinion and did so properly.

As is often the case, events that were unremarkable at the time took on sinister proportions after the tenure denial. A chance meeting with Professor Auerbach, who was by any account an early, if wavering, supporter of Namenwirth's tenure, eliciting correct advice from him that it would be better if Namenwirth published some research

from her initial grant before she sought renewal of the grant, was transformed into a discriminatory action on Auerbach's part to deter her from applying for any continuing research. Professor Sonneborn's often unresponsive reaction to male and female colleagues, generally acknowledged as part of his disposition, becomes in retrospect discriminatory behavior directed at Namenwirth.

The petition does not present any matter warranting certiorari. The district court simply performed its function in winnowing out the wheat from the incredible volume of chaff presented in this case, and made appropriate findings in accordance with the dictates of McDonnell and Furnco.

Petitioner's contentions that she was the only female to be hired for

tenure track in the department in a 35-year period and the only person to be actually rejected for tenure from the department mean nothing without other determinations of a statistical nature that were not presented. The total number of tenure decisions over a ten-year period was small, and in diverse fields. Namenwirth was rejected by the Divisional Committee. Lilien had been previously rejected by a prior Divisional Committee, but had applied for tenure prior to the last year. Namenwirth had specifically requested that her consideration be delayed until the last year. Timothy Moermond was in the process of being rejected until the grant approval swayed enough votes to carry his tenure. Nor did Namenwirth account for persons who may have left without a

formal rejection of tenure during that time.

The district court specifically found that the tenure decisions had tightened during the intervening years, and in particular since the early '70's. That is at least one reason for the tenure rejection in 1977. Certainly Namenwirth's skimpy and inconclusive assertion, which was not shown to have any statistical significance, does not trigger a test different from that applied by the district and circuit courts under McDonnell.

CONCLUSION

If there is anything that is disingenuous, it is the petitioner's assertion that an articulated reason for denial of tenure in this context can be "reasonable, true, genuine, not

arbitrary" and still be "pretextual." [Pet. p. 34.] Unlike the theoretical proposition described by the circuit court, if the assertion that Namenwirth did not meet the standards for tenure at the university at Madison is true and genuine, it removes all indirect proof of discrimination. Only a determination that Namenwirth had met the standards for tenure and still was not tenured would fit the circumstances identified by the circuit court. Such a scenario was not present in this matter. Here a finding that the reason was "true, genuine, reasonable" necessarily eliminates pretext.

While it is possible to quibble with the choices of words used by the district court, it is clear that the district court concluded, after considering an extensive record, that there was no sex

discrimination in the denial of tenure to Namenwirth. As this court held in Anderson, the trial on the merits should be the "main event." The findings of fact and conclusions made by the district court were reasonable and sufficient, without semantic exegesis, and were reviewed and upheld by the circuit court. Further review should be denied and this matter finally concluded.

Respectfully submitted,

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